United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,106

CLARE H. MADDEN,

Appellant,

v.

GIANT FOOD, INC.,

Appellee.

986

Appeal From the United States District Court
for the District of Columbia

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JOINT APPENDIX

[Filed August 7, 1961]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARE H. MADDEN
2941 Tilden Street, N. W.
Washington, D. C.

Plaintiff

vs.

GIANT FOOD, INC.
6900 Sheriff Road
Landover, Maryland

Defendant

Civil Action No. 2586-61

Serve upon Registered Agent:
JOSEPH B. DANZANSKY
1120 Connecticut Avenue, N. W.
Suite 1010
Washington, D. C.

COMPLAINT

(Personal Injury)

The Plaintiff complains of the Defendant and for cause of action alleges and says:

1. That this Court has jurisdiction of the within cause of action, the amount in controversy exceeding the sum of Three Thousand Dollars ($3,000.00).

2. That on the 18th day of June, 1960, this Plaintiff entered a food store of the Defendant located at 2154 Wisconsin Avenue, N. W., in the District of Columbia for the purpose of purchasing groceries and that while walking within said store for the purpose of making the purchases aforesaid, she stepped upon some strawberries there and then on the floor causing her to slip and violently fall to the floor.

3. Plaintiff says that as a result of so falling she injured her back and the following particulars to-wit:

a. That the muscles, tendons and tissue of her lower right lumbar region were bruised, strained and torn causing pain in the right lower extremity and that said injuries are permanent.

4. Plaintiff says that said injuries are the direct and proximate result of the carelessness and negligence of the Defendant for permitting said strawberries to be and remain on the floor of its store where this Plaintiff was walking for the purposes aforesaid.

5. That as a result of said injuries, this Plaintiff has been required to expend money for doctors and hospital treatment and that she has been unable to perform her household duties and that as a result thereof, she has incurred expenses in the amount of One Thousand Two Hundred Eight Dollars ($1,208.00) as of the date of the filing of this Complaint.

6. That because of the injuries above described, the Plaintiff has been damaged in the sum of Twenty-five Thousand Dollars ($25,000.00).

WHEREFORE, the Plaintiff, CLARE H. MADDEN, demands judgment against the Defendant, GIANT FOOD, INC., in the sum of Twenty-five Thousand Dollars ($25,000.00) and the costs of this action.

Craig, Summers & O'Hara

By George N. Craig
Attorneys for Plaintiff

Plaintiff demands trial by jury.

George N. Craig

[Filed August 18, 1961]

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted against this defendant.

Second Defense

The defendant admits that on June 18, 1960 the plaintiff sustained a fall while in defendants store at 2154 Wisconsin Avenue, N. W., in the District of Columbia. The defendant denies that plaintiff's accident was the result of any negligence or carelessness attributable to it. Defendant is without knowledge or information sufficient to form a belief with respect to the allegations of injuries and damages contained in the complaint. The remaining allegations of the complaint are denied.

Third Defense

The plaintiff's fall was caused or contributed to by her own negligence and lack of due care for her own safety.

HOGAN & HARTSON

By Jeremiah C. Collins
Attorneys for Defendant

[Certificate of Service]

[Filed May 27, 1964]

PRE-TRIAL PROCEEDINGS

Action for damages due to negligence.

The Parties Agree to the Following Statement of Facts and Stipulate Thereto: On June 18, 1960 at about 8:45 p.m., P entered a store operated by D at 2154 Wisconsin Ave., N.W., Wash., D. C. and while in the store, she sustained a fall.

Plaintiff claims that her fall, injuries and damages were caused by the negligence of D, in that D failed to keep floor free of substances, to wit, water, ice, vegetables and fruit; D permitted ice, vegetables, water and fruit to be and remain on the floor; that D either knew or should have known of the presence of said foreign substances on the floor, thus having notice thereof.

P's claimed injuries and damages are set out in the statement attached hereto, made a part hereof, and incorporated herein by reference, marked "A".

Defendant denies that her fall or any alleged resulting injuries or damages were the result of any negligence or carelessness on the part of the D or attributable to it; denies the nature and extent of the damages claimed by P; asserts that the P's fall and the resulting injuries and damages, if any, were the result of the P's sole or contributory negligence in that she failed to look or look effectively where she was going, failed to observe or observe effectively the conditions which existed in the area of her alleged fall, and failed to walk and place her feet with due care for her own safety in view of the condition which she claims to have existed there; P assumed the risk of harm from conditions which apparently were obvious to her.

D denies it created or had notice of the condition described by P as the cause of her fall.

Stipulations

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before July 1, 1964, a list of the names and addresses of all witnesses known to them, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

The parties agree to the mutual exchange, of all medical reports of examining or treating physicians, now in hand, on or before July 1, 1964;

and a similar exchange of all other such reports within 48 hrs. of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

Witnesses known to D are: Dr. Paul J. O'Donnell, 915 19th St., N. W., the P; and the following employees who may be reached care of Giant Food, Inc., 6900 Sheriff Rd., Landover, Md.: Ray Emswiller, F. Sample, Herbert Rockwell.

Counsel for P agrees to supply to counsel for D, on or before July 1, 1964, with a copy to the Clerk of Ct., a written itemized statement, including dates, which constitute the expenditures for maid service, including the names and addresses of all persons who acted in that capacity.

Counsel for P agrees to supply to counsel for D on or before July 1, 1964, with a statement as to P's personal income including the names and addresses of all employers, from Jan. 1, 1959 to date.

Following may be admitted in evidence without formal proof, subject to all legal objections: records of Anderson Clinic or Nat'l. Orthopedic Hosp. re P, provided counsel for P supplies counsel for D with a written authorization which will enable D or its representatives to examine and copy said records; HEW Mortality Table; x-ray plates; hosp. bills initialled by Examiner.

Counsel for P agrees to supply to counsel for D and the Clerk of Ct. on or before Aug. 1, 1964, with a written itemized statement of future medical expenses and maid service costs which will be offered at the trial.

NOTE: Permanent injury is claimed, but at pretrial no written medical evidence was produced, which in the opinion of the Examiner, substantiates such a claim.

The Examiner has requested counsel for the parties to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

John J. Finn
Pretrial Examiner

TRIAL COUNSEL:

James J. Bierbower, Esq. for P

Jeremiah C. Collins, Esq. for D

PLAINTIFF'S PRE-TRIAL STATEMENT

Occurrence

1. Plaintiff entered defendant's store at 2154 Wisconsin Avenue in the District of Columbia at about 8:45 p.m., June 18, 1960 for the purpose of purchasing food.

2. The plaintiff was required to walk over a floor upon which there was water, ice, vegetables and fruit.

3. An employee of defendant was present placing produce in a container from the display counter.

4. It was approximately 8:45 p.m. on Saturday evening and near closing time.

5. Plaintiff slipped on some of the ice, water, vegetables or fruit then and there upon the floor.

A. A mashed strawberry was noticed near plaintiff's position after she fell.

Negligence

1. Failure of the defendant to keep the floor free of substances that caused plaintiff to slip and fall.

2. Negligence of the defendant in permitting ice, vegetables, water and fruit to be and remain on the floor which caused plaintiff to slip and fall.

Injuries

1. Previous medical history indicates that plaintiff had a weak back.

2. The injuries sustained by plaintiff's fall on June 18, 1960 in defendant's store constituted a strain and weakened the ligaments in the lower back area, causing weakness of the back with pain radiating down the lateral aspect of the left leg, with possible disc protrusion.

3. Muscle spasms in the lower back area.

4. Stretching of the lumbosacral nerve roots.

5. Pain and suffering upon movement, with resultant mental anguish.

6. Plaintiff is required and will be required for an indefinite period to wear a brace corset.

7. The injury is permanent.

8. Plaintiff is 41 years old, with a life expectancy of 36.1 years.

Special Damages

Visits to personal physician	$ 10.00
National Orthopedic Hospital	$ 102.00
Anderson Clinic	$ 221.00
Transportation	$ 88.00
Maid Service to date	$8787.00
Total	$9208.00

Also future medical expenses and maid service

Request for Stipulation

Hospital records and bills.
X-Rays and X-Ray Reports.
Mortality Tables, HEW.

Request

Report of medical examination performed by Dr. Paul J. O'Donnell.

CRAIG, SUMMERS & O'HARA

By George N. Craig

James Bierbower
Attorneys for Plaintiff

[Certificate of Service]

[Filed June 26, 1964]

COMPLIANCE WITH PRE-TRIAL ORDER

The plaintiff in compliance with the pre-trial order hereinbefore made says:

1. List of known witnesses to be used at trial:

   (a) O. Anderson Engh, M. D.
   South 25th Street & Army Navy Drive
   Arlington, Virginia

   (b) John J. Madden, husband of plaintiff

   (c) Rose Dolan, maid
   5004 Aurora Drive
   Kensington, Maryland

   (d) Children of plaintiff: John Madden, Jr., age 16; Michael Madden, age 14; Paul Madden, age 13; Kevin Madden, age 11; Mary Rose Madden, age 10.

   (e) Employees of Giant Food, Inc.

   (f) Plaintiff herself

2. Plaintiff herewith attaches medical reports dated June 8, 1964 and June 18, 1964 of Dr. O. Anderson Engh. These are the latest reports received by plaintiff. They are identified as "Exhibit A".

3. Plaintiff is available at reasonable hours to submit to physical examination by a physician of defendant's choice.

4. Rose Dolan, above-mentioned, is the only maid employed by plaintiff and herewith attached as "Exhibit B" is the itemization of money paid for maid services for the years 1960, 1961, 1962, 1963 to and including the date, May 29, 1964. Maid service is still required by plaintiff.

5. Herewith attached, marked "Exhibit C", is a statement of income derived by plaintiff as a government employee working for the Department of the Navy for years 1961 through 1964.

6. Plaintiff cannot with certainty provide an itemized statement for future medical expenses since they are unknown and her physical disability continues. Maid services for the future likewise cannot be estimated except to say that they will, in the opinion of plaintiff, be required in the foreseeable future.

CRAIG, SUMMERS & O'HARA

By George N. Craig
James J. Bierbower
Attorneys for Plaintiff

[Certificate of Service]

[EXHIBIT A]

ANDERSON ORTHOPAEDIC CLINIC
Arlington, Virginia 22206

REPORT ON: MADDEN CLARE
2941 Tilden Street, N. W.
Washington, D. C.

DATE OF EXAMINATION: June 8, 1964

PROGRESS REPORT: It will be necessary for this patient to have some new X-Rays taken of the lumbosacral area. The patient has been wearing a corset type of brace. It is quite badly worn and it will be necessary for her to obtain a new one. She complains of a dull ache throughout the low back. It is severe when she first gets up in the morning but it gradually improves. It is made worse by driving a car; this produces a pulling sensation throughout her back. Bending with her knees straight aggravates the condition. Ironing particularly aggravates it.

She has some tenderness throughout the lumbosacral area. The straight leg raising test, however, is negative and there is no atrophy or reflex changes throughout the left lower extremity. Sensation is normal to light touch, pain, temperature and position.

The patient's problems at the present time are subjective in character as would be expected in a chronic low back disorder. It is my opinion that the patient is suffering from a chronic strain involving the ligamentous structures of the low back and it will be necessary for her to continue indefinitely with a low back support.

O. Anderson Engh, M. D.

jh/6-8-64

3 cc: George N. Craig, Attorney at Law

Exhibit A (Continued)

ANDERSON ORTHOPAEDIC CLINIC
Arlington, Virginia 22206

REPORT ON: MADDEN CLARE
2941 Tilden Street, N. W.
Washington, D. C.

DATE OF EXAMINATION: June 18, 1964

PROGRESS REPORT: X-Ray films were made of the low back and these do not reveal any significant changes. I do not notice any change from her previous films.

I have no recommendations to make to the patient except that she use some warm fomentations at home to her back and have her husband massage her back. She should use a firm mattress with some boards between the springs and mattress and at night it is suggested that she pull up one knee while lying on her side or sleep with a pillow beneath her knees, in the supine position.

Objectively, there are no positive findings and her difficulties are due to a chronic strain. In other words, her difficulties are subjective in character. It is necessary, however, for her to continue with the low back support and I have suggested that she obtain another one.

O. Anderson Engh, M. D.

jh/6-18-64
3 cc: George N. Craig, Attorney at Law

Exhibit B (Continued)

MAID SERVICE 1960

6-20 thru 6-24-60	$50.00	
6-27 thru 7-1-60	50.00	
7-5 thru 7-8-60	40.00	
7-11 thru 7-15-60	50.00	
7-18 thru 7-22-60	50.00	
7-25 thru 7-29-60	50.00	
8-1 thru 8-5-60	50.00	
8-8 thru 8-12-60	50.00	
Sept. maid one day a week	40.00	
Oct. " " " "	40.00	
Nov. " " " "	40.00	
Dec. " " " "	50.00	
Total for 1960		$560.00

JAN 1961 THRU JAN. 5, 1962

Jan. maid one day a week	40.00
Feb. " " " "	40.00
Mar. 3	8.00
Mar. 10	8.00
Mar. 17	10.00
Mar. 20 thru Mar. 31	100.00
Apr. 3 thru Apr. 14	100.00
Apr. 17 thru Apr. 28	100.00
May 1 thru May 12	100.00
May 15 thru May 26	100.00
May 29 thru June 9	90.00
June 12 thru June 23	100.00
June 26 thru Jul. 7	90.00
Jul. 10 thru Jul. 21	100.00
Jul. 24 thru Aug. 4	100.00
Aug. 7 thru Aug. 18	100.00
Aug. 21 thru Sept. 1	100.00
Sept. 5 thru Sept. 15	90.00
Sept. 18 thru Sept. 29	100.00
Oct. 2 thru Oct. 13	100.00

Exhibit B (Continued)

Oct. 16 thru Oct. 27	100.00
Oct. 30 thru Nov. 10	100.00
Nov. 13 thru Nov. 24	100.00
Nov. 27 thru Dec. 8	100.00
Dec. 11 thru Dec. 22	100.00
Dec. 26 thru Jan 5 - 1962	80.00
Total	$2156.00

JAN. 8, 1962 THRU JAN. 4, 1963

Jan. 8 thru Jan. 19	100.00
Jan. 22 thru Feb. 2	100.00
Feb. 4 thru Feb. 16	100.00
Feb. 19 thru Mar. 2	90.00
Mar. 5 thru Mar. 16	100.00
Mar. 19 thru Mar. 30	100.00
Apr. 2 thru Apr. 13	100.00
Apr. 16 thru Apr. 27	100.00
Apr. 30 thru May 11	100.00
May 14 thru May 25	100.00
May 28 thru June 8	90.00
June 11 thru June 22	100.00
June 25 thru Jul. 6	90.00
Jul. 9 thru Jul. 20	100.00
Jul. 23 thru Aug. 3	100.00
Aug. 6 thru Aug. 17	100.00
Aug. 20 thru Aug 31	100.00
Sept. 3 thru Sept. 14	90.00
Sept. 17 thru Sept. 28	100.00
Oct. 1 thru Oct. 12	100.00
Oct. 15 thru Oct. 26	100.00
Oct. 29 thru Nov. 9	100.00
Nov. 12 thru Nov. 23	100.00
Nov. 26 thru Dec. 7	90.00
Dec. 10 thru Dec. 21	100.00
Dec. 24 thru Jan. 4	80.00
Total	$2530.00

Exhibit B (Continued)

JAN. 7, 1963 THRU JAN. 3, 1964

Jan. 7 thru Jan. 18	100.00
Jan. 21 thru Feb. 1	100.00
Feb. 4 thru Feb. 15	100.00
Feb. 18 thru Mar. 1	90.00
Mar. 4 thru Mar. 15	100.00
Mar. 18 thru Mar. 29	100.00
Apr. 1 thru Apr. 12	100.00
Apr. 15 thru Apr. 26	100.00
Apr. 29 thru May 10	100.00
May 13 thru May 24	100.00
May 27 thru June 7	90.00
June 10 thru June 21	100.00
June 24 thru Jul. 5	90.00
Jul. 8 thru Jul. 19	100.00
Jul. 22 thru Aug. 2	100.00
Aug. 5 thru Aug. 16	100.00
Aug. 19 thru Aug. 30	100.00
Sept. 2 thru Sept. 13	90.00
Sept. 16 thru Sept. 27	100.00
Sept. 30 thru Oct. 11	100.00
Oct. 14 thru Oct. 25	100.00
Oct. 28 thru Nov. 8	100.00
Nov. 12 thru Nov. 22	90.00
Nov. 25 thru Dec. 6	90.00
Dec. 9 thru Dec. 20	100.00
Dec. 23 thru Jan. 3	80.00
Total	$2520.00

JAN. 6, 1963 THRU MAY 29, 1964

Jan. 6 thru Jan. 17	100.00
Jan. 20 thru Jan. 31	100.00
Feb. 3 thru Feb. 14	100.00
Feb. 17 thru Feb. 28	90.00
Mar. 2 thru Mar. 13	100.00
Mar. 16 thru Mar. 27	100.00

Apr. 2 and 3	12.00
Apr. 6, 9 and 10	20.00
Apr. 13, 16 and 17	20.00
Apr. 20, 23 and 24	20.00
Apr. 27, 30 and May 1	20.00
May 4, 7 and 8	20.00
May 11, 14 and 15	20.00
May 18, 21 and 22	20.00
May 25, 28 and 29	20.00
Total	$762.00

[EXHIBIT C]

SALARY

1961	$3,916.00
1962	5,381.22
1963	5,412.84
1964	1,654.08

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
Friday, October 30, 1964

The above-entitled cause came on for further hearing before THE HONORABLE DAVID A. PINE, United States District Judge at ten a.m.

[3] ARGUMENT ON BEHALF OF THE DEFENDANT

MR. CASEY: Ladies and gentlemen, what I am here for is not to review the evidence with you impartially. I am sure you know that what I say is not evidence and that what I say with respect to the evidence is not uttered by someone like yourselves and like so many

others in this courtroom whose duty it is to participate in this lawsuit impartially, with no interest for one side or the other.

I am not paid to come and sit here for six or seven hours a day. I am paid to come and do what I can within the proper practice of my profession to see that my client gets a favorable result.

So I think it would be entirely justified for you to listen to what I have to say with the proper measure of suspicion because it is not uttered by someone who has no interest in how this case comes out.

I am sure that it is apparent what I have to think and what I have to wish or hope for by way of a result in this case.

The job of determining the result is not mine, but yours. You who have been sworn to decide the case without [4] any partiality for the plaintiff or for the Giant Food Stores, it will be your job, I think the Court will instruct you, to find the truth, that is, to return a verdict which represents the truth-seeking process that you will go through in the jury room.

That is precisely what jurors have traditionally done in the District of Columbia.

It may be a notion as a result of magazine, newspaper or Sunday supplement articles that in this country all you need do, if you want to achieve an endowment through a personal injury case, is to be an individual who can pick on one of the sitting ducks, that is, the corporations who are profit-making corporations, who either invite the public into their stores or other places of business in great numbers and are unlikely to be able to come forth with witnesses with vivid recollections as to what indeed did happen four years ago, when the case is called for trial, or corporations who transport large numbers of persons on streetcars, buses, railroad trains and airplanes;

And that the jury will be so impressed by the opportunity to understand, to have sympathy for another human being and so unimpressed with the rights of a corporation, a big outfit, a money-maker, an organization to whom we, as human beings, are continually paying

money, and never receiving [5] what we think we should get for that money.

So, with confidence, plaintiffs seeking awards for personal injuries come forth and present the kind of reasoning you have just heard.

Perhaps it happened this way or perhaps it happened that way, or maybe it happened a third way.

Oh, they have got the burden of proving just how it happened and that that reason was the result of negligence on the part of the corporate defendant, but they don't suspect that a jury will look at their case with the same purposeful, business-like attitude that they go about the important decisions in their own personal lives —

And that the jury won't look at their presentation with an accurate memory of what the evidence actually was, rather than what was promised on opening statement —

That the jury won't comprehend the burden of proof and other principles of law that will be given to the jury by the Court —

And, thirdly, that the jury will deprive itself of the third valuable tool for utilization in the jury room, the jury's common sense —

For if a jury has a good recollection of the evidence, a fair understanding of the instructions as to the law that are given to it by the Court, and applies its common sense, that is, [6] its collective experience in living in this world and seeing how things usually happen, what is likely and what is highly improbable, the result will be exactly what it should be, a fair analysis of the evidence under the instructions given to the jury by the Court.

I think you will find under the instructions of the Court in this case that your big job is really to determine whether the burden of proof has been borne on the issues that are for your decision.

In effect, the burden of proof comes into play initially in a case like this because one party, in this case the plaintiff, says that, 'I have been injured as a result of your negligence, and because it was your negligence, your fault that injured me, you must compensate me. You must pay me. You owe me money for my injuries."

Under those circumstances, the Court — and you will get the instructions very shortly — the Court says that a person who says they are entitled to money from another because they have suffered as a result of the negligence of that defendant must prove by a preponderance of the evidence, that is, bear the burden of proof on every issue that is essential to their cause of action.

In that case, as the Court will instruct you, I believe you will be told here that the plaintiff must bear the burden [7] of proof, that is, prove by a preponderance of the evidence, either that the store was negligent in causing a strawberry to be on the floor; or, if the store didn't cause the strawberry to be on the floor, that the store actually knew, had actual notice that the strawberry was on the floor and because they actually knew it was there, they should have removed it before it hurt somebody;

Or, if the store didn't put it there and didn't have actual notice of its existence on the floor, that the strawberry had been on the floor so long, that the strawberry had been there so long that reasonable men under the circumstances should have known it was there and removed it before it caused injury.

Now, if the plaintiff bears the burden of proof on any one of those three issues there comes into play a second issue in the case, mentioned to you on opening statement, and that is the issue of contributory negligence.

For I believe that you will be instructed that not only can the defendant be negligent here, that is, not only can the defendant fail to exercise reasonable care, not only can the defendant be negligent in failing to exercise reasonable care for the safety of its customers, but the customer owes the same duty for her own safety.

That is, the customer, an adult woman in her mid-[8] thirties, owes a duty, like the stores, to exercise reasonable care for her own safety and if she fails to exercise reasonable care for her own safety, and as a result of that she is injured, then even though the store's

negligence was one of the causes of her injury, her contributory negligence, negligence on her part, that coupled with the store's negligence caused her injury, will bar her recovery on the doctrine of contributory negligence.

So that even if the plaintiff bears the burden of proof in proving we were negligent in one of the three respects they charge, they can't recover if the defendant is able to prove by a fair preponderance of the evidence that the fall was also caused by negligence on Mrs. Madden's part.

Now, what is the burden of proof? Obviously, if the evidence on any issue in the case is overwhelming in the plaintiff's favor, the plaintiff wins on that issue, whether it is an issue of our negligence through putting the strawberry there, knowing it was there and not removing it, or failing to know it was there after it had been there a long time —

If their evidence on that score far outweighs ours, they have borne the burden of proof and established our negligence.

Now, of course, if the defendant's proof overwhelms [9] the plaintiff's on any part of the issue of our negligence, the plaintiff has failed to bear the burden of proof to prove we were negligent in putting the strawberry there, in knowing it was there and not removing it, or allowing it to be there so long and not removing it before the fall —

Then, of course, the defendant would prevail on the issue of whether or not the store was negligent.

But the significance of the burden of proof is best illustrated by the situation where you consider all the evidence tending to prove the store negligent, and all the evidence tending to prove that the store wasn't negligent, and you find that they are about equally balanced, either that there is a great weight of evidence on both sides of that question, and it is evenly balanced.

In that event the plaintiff has failed to bear her burden of proof, since her evidence does not outweigh the defendant's evidence on that score. It is a tie and the defendant wins on the question of whether or not negligence on its part was a cause of the accident.

Or, if you should find that there really isn't much to be said by the proof of what they have offered or the proof of what we have offered on the question of, in this instance, our negligence — that it is a tie, there isn't much to be put on one side of the argument or the other — in that [10] instance again the defendant would win on the question of whether or not the store was negligent because the plaintiff has failed to prove, failed to bear the burden of proof, failed to offer evidence that preponderates, as she said it would — "You owe me money because your negligence hurt me and what is more, I can prove your negligence hurt me by a fair preponderance of the evidence in a court of law before a jury."

Now, what are the issues that will be submitted for your consideration?

What are the questions as to which you must determine whether the plaintiff has borne her burden of proof?

You know that this case really involves two big things: one, a back; secondly, a strawberry.

Let's look at the back first. Has the plaintiff borne the burden of proof as she said she could, that she sustained a serious back injury in the incident of June 18, 1960?

Well, at first they tried and did just what I told you so many believe is successful before a jury.

They painted the big claim against the sitting duck corporate defendant. They came before you and described the injury as a possible protrusion of an intervertebral disk, knowing well that by mentioning the word disk the ears [11] of all jurors would be impressed with this type injury, for, as most people know, it can sometimes be a most disabling condition.

They knew at that time, ladies and gentlemen, when they promised that to you as part of their proof on opening statement, that Doctor Engh had testified in his deposition in this case that as long ago as August 9, 1960, ten days less than two months after the accident occurred, that he was not of the opinion that there was a disk injury here. He had testified that she probably does not have any such injury.

They knew that but you are not going to impress a jury if you come in and talk about a long series of back discomforts over fourteen years, ten of which predate the accident in question.

The big brush is pointed disk, although they know they can't prove it and hope the jury will forget that there wasn't one — one word of testimony here that the condition this woman suffers from today or has suffered from since August 9, 1960, over four years ago, was a disk injury.

They knew well, too, when they had their other promise of proof regarding back that they couldn't prove it.

But they were talking when they outlined the expenses here — $500 they said for Anderson Clinic and [12] National Orthopedic Hospital. It turned out to be when the proof came forward that it was $221 for the Clinic and $102 for the hospital, for a total of $323; $10 for the personal physician.

So they promised the jury that the evidence would show that as a result of this accident this lady had lost $8,787 in salary for a maid.

They didn't tell you — as a matter of fact they didn't even elicit that the maid was a lady who had lived in the house for fifteen years, ten or fifteen years, 1940, 1945 to 1955, before her retirement.

And, of course, no one lives, no woman certainly lives as a roomer, a woman of the type of Miss Dolan, lives in a house with seven children without helping out — but she lived there fifteen years before her retirement, four or five years after, which would bring her right up to about 1949 or 1960, and was back living with them again — that that was the maid.

And as a result of hiring the maid, the plaintiff could go back to her job that she had before she had any children, 1946, at the Bureau of Ships, which Doctor Engh described in his testimony in deposition as a regular job.

Since March 17, 1961, Saint Patrick's Day in 1961 when Miss Dolan came to live with the Maddens, as a result of [13] having the maid service, there was no loss of earning in this family, there was a gain financially since the plaintiff was earning over $5,000 a year, more than she paid for the maid.

Was there candor in presenting to you what they promised they could, a serious-natured back injury?

Remember it was discovered yesterday that in the deposition of November 28, 1961, the plaintiff, the person who seeks injury here not for a strawberry, but for a bad back — so it certainly is a prominent matter in her mind — when asked if she had ever had back care before, said that five years before the accident, 1955, she had trouble with her back during pregnancy and had seen Doctor Engh.

Knowing that this wasn't the full story, on opening statement, before she testified, we told you that the evidence would show also that she had seen Doctor Engh on one other occasion.

So, of course, knowing we were about to prove it, on her direct testimony she recalled, yes, in 1959 she had been to him, and she was reminded of that because we mentioned it in trial, and that all that was, was a kidney infection, she had seen Doctor Engh once, then saw another doctor who gave her a urine test and a prescription andone day later, it was all better. It wasn't a back complaint at all.

Well, the fact is that from Doctor Engh's own [14] testimony, and they offered it, not us — it was from his records, not memory — this lady didn't have her back condition resolved as a kidney infection with one pill from another doctor in 1959.

One year to the day almost before the accident in question, the fact is this back had been strapped twice by Doctor Engh within a

year before the accident, or the 16th of June, 1959, and the thirtieth, and that strapping after the thirtieth was to remain on, wasn't it two weeks, before she was to remove it herself — a month with back-strapping within a year before the accident and a jury is told they should believe it was just a kidney infection.

Then it developed that there was an incident in 1950 with this back, in which Doctor Engh had rendered care.

Ladies and gentlemen, can any of you looking at the situation here of a party before you seeking damages for an injured back believe that there was candor in telling you that that bad back had resulted in a loss of earnings, necessity to pay a maid to do her job, of $8,787?

Can you believe that there was candor in admitting the health of this back and what it needed by way of other medical care, when about a year after the accident, 1961, November 28, Mrs. Madden couldn't remember that this same back, the health of which was the heart of the law suit, had been [15] treated by Doctor Engh only a year before the accident, two years — a year and a half before the deposition, June of 1959, had been treated in 1955, had been treated as far back as 1960?

Now, Doctor Engh said something interesting. He was asked whether or not, on cross-examination in the deposition, there was evidence of tearing here, and Doctor Engh said, "Well, I didn't see her until a week after the accident. Her own doctor, Doctor Saccardi, would know better because the acute symptoms, the objective symptoms are found shortly after the trauma. Afterward we expect to find little by way of objective symptoms, much perhaps by way of subjective symptoms."

You will be told, I believe, that if a party has failed to call a witness which is peculiarly available to him, you may infer that had that witness been called, his testimony would have been against the party who failed to call him.

Can you believe that if this back had had no treatment other than what was finally admitted here, treatment by Doctor Engh in '50, '55, '59, and '60, that they would not have called as a witness Doctor Saccardi, who has been the family doctor here? — the doctor to whom they went, called right after the accident and went a day later for treatment of the back as a family physician, and he after a week decided [16] that perhaps she should go to an orthopedist?

Can you believe if Doctor Saccardi were called he would say, "In the time I have treated this lady I have never known her to have a bad back prior to 1950 — between 1950 and 1955, '55 to '59, or in the year between 1959 and 1960"?

Who originally sent Mrs. Madden to Doctor Engh? The obstetrician for this lady who has been blessed with seven children — he sent her when she had trouble getting out of bed during a pregnancy in 1950. He realized there was a bad back here and sent Mrs. Madden to a specialist in bad backs, an orthopedic surgeon.

Can you believe that if Doctor Sheffery, the obstetrician, was in a position to say, 'I have treated this lady for pregnancy from 1946 through four years ago — three years ago — and I have never known her to have a bad back except in 1950," — that he wouldn't have been called as a witness here?

Ladies and gentlemen, I ask you to consider not only the instruction on the witnesses who weren't called and what you suppose in your common sense they would have said had they been here, but alsc listen to the instructions of the Court when the Court tells you that if you find that any witness in this case has testified falsely as to any material [17] matter with respect to which they cannot reasonably be expected to be innocently inaccurate, then you are at liberty to disregard all or any part of all the testimony of that witness.

Who would know best in this world — not me, certainly — who would know best in this world whether this was a comfortable back that did not require treatment by doctors for at least ten years before this accident than Mrs. Madden, the owner of the back? —

The only person who could feel the pains she has reported we have learned at least on four occasions to an orthopedic specialist, once to an obstetrician, and once to her family doctor before the accident occurred.

Under oath, a year after, in the deposition she said only in 1955, five years before the accident.

Now, passing on to the question of negligence here and the burden of proof that you consider on those issues:

They have asked you to conclude that perhaps it was this and perhaps it was that, but your job in this case, as I believe you will learn from the Court, is to decide this matter on the record and to bring an attitude to it that is apart from sympathy for a human being or against the corporation, but to be the balance of truth and justice in this courtroom.

[18] Your verdict must be based not on guessing, not on speculation, but on the facts, on the evidence, not what may have happened, not what perhaps was the case, but what you heard from the witness stand and the fair inferences that you can draw from it.

First, they say it is entirely possible, perhaps it was the negligence of Giant that caused the strawberry to be on the floor.

Who said —who said one thing in the entire trial about how that strawberry got there? There isn't any evidence of how the strawberry got there, certainly, no evidence that the strawberry was there not as the result of a customer dropping it when she sampled the last box or any of a million other things.

It may have been a Giant employee that dropped that strawberry on the floor for Mrs. Madden to fall on, but you and I don't know that to be so by a preponderance of the evidence because there is no evidence on that score.

You will recall the Court, after the direct and cross-examination of Mrs. Madden yesterday, asked Mrs. Madden whether if among the things the produce clerk was putting in the aluminum container were strawberries.

She said no, only vegetables, only greens. She did not see that produce clerk, the only person known to touch the [19] produce in the store except Mrs. Madden's own bananas — she did not see that clerk doing anything with strawberries.

Then they say perhaps, perhaps, maybe, it is entirely possible that the store had actual knowledge, that is, some employee of the store actually knew that strawberry was there and didn't remove it before somebody fell on it.

That is entirely possible. It is entirely possible that someone in the bakery department, produce department, the meat department, the grocery department or a checker knew the strawberry was there and didn't do what they should have done, remove it before Mrs. Madden fell.

But you can't do anything but guess that that was the case because there is no evidence on that score. There is no fact to which anyone has testified with respect to the knowledge on the part of anybody in the store, including Mrs. Madden, that that strawberry was there before she says it caused her to fall.

Lastly, they say, well, if we haven't proved that the store put it there and if we haven't proved that the store actually knew it was there, then we have proved perhaps that the strawberry had been there so long that the store's employees, in the exercise of reasonable care, should have known it was there and removed it before Mrs. Madden fell on it.

[20] There is no evidence in this case, as Mrs. Madden testified herself — no one knows, she said, how it got there and no one knows, to her knowledge, how long it had been there.

She said no one told her anything about the condition of the floor. She didn't ask about it. She told no one what she had seen on the floor that night and no one told her how the strawberry got there.

Ladies and gentlemen, remember particularly with respect to the challenges thrown out to me with respect to what was on the floor —

no one has said — no one has said that there was any foreign matter on the floor of the store except Mrs. Madden.

No one has said that there was a produce clerk there except the lady that didn't remember in November of 1961 that she had had her back strapped twice for a month in 1959, the same back for which she was seeking damages in the case in which she testified.

Ladies and gentlemen, I don't know what was in that aisle and I submit to you no one else does except Mrs. Madden.

From what Mrs. Madden knows and from what she and all the other witnesses who have testified in the trial have said, we don't know how the strawberry got there.

There is no evidence of how it got there. It will roll. Sure, strawberries roll. You can throw them, too. You [21] can drop them. They can come off the top of a box or they can fall out of your hand while you are trying to eat two or three of them.

It could have gotten there in a thousand ways, but nobody knows — no one can say that the scales are tipped, that it was a Giant employee. If so, which one?

No one can say, "The scales are down by a preponderance of the evidence. We find that that strawberry was there as a result of negligence on the part of this employee or that employee of the Giant Food Stores."

No one can say that, "As a result of what we have heard in this trial, we find that scale is down by a preponderance of the evidence. We know that in the brain of somebody in that store, who was employed by Giant, there was knowledge that there was a strawberry down there that should be removed, but I am not going to do it."

No one can say how long that strawberry was there, and therefore no one can say that constructive notice was imputed to the store, that the strawberry had been there so long that the store should have known about it and removed it because we don't know whether it was there one second before Mrs. Madden's fall or all day long, June 18, 1960.

Thank you.

[22] CHARGE TO THE JURY

THE COURT: Members of the jury, the taking of testimony has been completed and the summations of counsel concluded.

It now becomes my duty to charge the jury which means to give to the jury the principles of law which are to guide them in this case.

You, the jury, are required to follow the law as I give it to you, because I am the exclusive Judge of the law.

On the other hand, you have a correlative duty of finding the facts, because you are the judges of the facts, the sole judges of the facts, and after you have found the facts, you will apply the law as I give it to you to those facts and reach a correct verdict.

How do you find the facts? You find them from the evidence and inferences reasonably deducible from the evidence and nothing more.

The evidence consists of the testimony you have heard from the lips of witnesses; or by deposition, which is a substitute for testimony from a living witness who testifies before you; the exhibits and nothing more.

Where there has been a stipulation, that stipulation of a fact may be considered by you as a proven fact.

Now, in weighing and evaluating and in determining [23] the credibility of witnesses, you will take into consideration the manner and demeanor and conduct of the witnesses as they testified; whether they appeared to you to be truth-telling persons or not;

Their memory or their lack of memory; their ability to see and hear the things about which they testified; their ability to express to you through words what they have seen or heard;

Any bias or prejudice which any of them may have displayed which may have perverted their testimony; and any interest in the outcome of the case, which may have colored their testimony;

And any contradictions which a witness may have made growing out of something said before and what was said on the stand.

If you believe that any witness has testified falsely in respect of any material matter concerning which he could not have been mistaken, you are at liberty to disregard all of that witness' testimony or so much of it as you find to be untrustworthy.

If you believe that any party to this controversy has failed to call a witness peculiarly available to him who could give evidence material to the controversy, and has given no reasonable explanation for not calling that witness, [24] you may infer, although it is entirely up to you, that that witness, if called, would give testimony adverse to the party failing to call him.

Now, you are not to let sympathy or prejudice enter into your deliberations or into your thinking or into your verdict.

You are to approach your task and perform your task calmly, dispassionately and unemotionally, bearing in mind that you are the factfinders, the judges of the facts. You are not to let emotion of any kind influence you in finding those facts.

You are not to guess and you are not to speculate. That does not mean when weighing and evaluating the testimony you may not consider your experiences in life or you may not bring into play your common sense when you determine how much credit you will give to a witness' testimony.

Now, the fact that the plaintiff is an individual and the defendant is a corporation makes no difference in the eyes of the law. They are entitled to the same equal treatment as if they were both corporations or both individuals.

You should give careful consideration to the summations of counsel, because they are designed to assist you in understanding their respective positions, and assist you in marshaling and organizing the facts in your minds, but bear in mind that what counsel may say to you is not evidence, [25] but it is only their recollection of the evidence.

If anything they say is contrary to your recollection, it is your recollection that governs and not theirs.

You should also bear in mind that each is an advocate of his particular side and consider his summations in the light of that advocacy.

I shall comment on the evidence not for the purpose of usurping your function as factfinders but for the purpose of assisting you, I hope, in understanding the crucial issues involved in this case.

If anything I say to you is contrary to your recollection, it is your recollection that governs and not mine, so far as the evidence is concerned, because what I say to you is not evidence.

Now, there was a stipulation that the life expectancy of the plaintiff was — I have forgotten how many years — 36 years. That stipulation was based on the mortality tables and the mortality tables are made up of the experience of thousands upon thousands of people and represent the average life expectancy of many thousands of people. The table can be considered by you and the stipulation regarding her life expectancy can be considered by you, but it does not mean that this plaintiff is going to live that long. She may live longer. She may not live longer. None [26] of us know.

The burden of proof in a law suit rests upon the party asserting the affirmative of an issue, so in this case the burden of proof rests upon the plaintiff to establish the essential elements of her claim, because she is asserting the affirmative.

Likewise, the burden of proof in respect of contributory negligence, which is a defense made by the defendant, is upon the defendant to establish contributory negligence. I shall explain, as I say, contributory negligence before I am through.

Now, that burden of proof is carried by a preponderance of the evidence. Some of you may have sat in criminal cases where you were told that the standard of proof was proof beyond a reasonable doubt.

But this is not a criminal case. This is a civil case. The standard of proof is different. Here the standard is a preponderance of the evidence.

That does not mean the greater number of witnesses on one side or the other. It means that state of the evidence which weighed against that which is opposed to it is more convincing to your minds as jurors. It is the greater weight of the evidence.

If you believe that there is an equipoise in the [27] evidence on any material issue in this case, the party having the burden of proof has not established it, because the evidence would then be in balance.

I shall use the term proximate cause both in relation to negligence and in relation to damages.

The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish it -- that is, the injury.

It may operate directly or by putting intervening agencies in motion.

Now, the fact that an accident occurred and that the plaintiff was injured does not give rise to liability on the part of the defendant, Giant Food Company or Giant Food, Inc.

Before there can be liability, there must be a finding that the defendant was negligent and that such negligence proximately caused the plaintiff to fall and injure herself, and that she herself was free of contributory negligence proximately causing her to fall.

What is negligence? Negligence is the want of reasonable care, the care of an ordinarily prudent person. [28]

It is the doing of something which an ordinarily prudent person would not do or a failure to do something which an ordinarily prudent person would do.

The defendant is not an insurer of the safety of all persons invited to come into its premises and the mere fact of the happening of the accident without more does not constitute negligence or evidence of negligence or want of care on the part of the defendant.

However, it was the duty of the defendant inviting customers and prospective customers to come to its store to exercise reasonable care to maintain its store and aisles in a reasonably safe condition for persons like the plaintiff invited to come upon the premises of the defendant and purchase foodstuffs from the defendant.

The failure to exercise that care would constitute negligence.

Now, from the plaintiff's testimony, it appears, as I recall it, that on a Saturday before Father's Day in 1960, Father's Day occurring on Sunday, that there were no other customers in the store that she observed, and near closing time, upon her entry into the store, she observed an employee taking vegetables from a vegetable stall and putting them in an aluminum receptacle for safekeeping over the weekend and to keep them from perishing; [29]

That nearby she saw some bananas for sale and placed some bananas in a bag and took them to the clerk at the vegetable stall to be weighed and the price indicated on the bag;

That in this vicinity she noticed and walked through an area in which there was ice, water and discarded vegetable produce on the floor;

That she asked the clerk who weighed the bananas for directions to the counter selling chocolate and was directed by the clerk weighing the bananas to the part of the store in which the chocolate was sold;

That she walked in that direction cautiously through this area which contained ice, water and refuse of discarded vegetables, for several feet and then came to an end of it;

And then after taking two or three steps she slipped and fell forward; that upon being assisted to a counter by an employee of the store the counter being nearby, she noticed a mashed strawberry and a skid mark at the place where she fell, which was otherwise free of refuse or debris.

On this basis she claims that defendant was negligent in that its employee, through whose act the defendant is responsible, had either

caused the strawberry to be dropped on the floor from a strawberry counter nearby or if they had not caused it to be dropped on the floor, that it had been on [30] the floor and not removed for such a length of time that the store either knew or in the exercise of reasonable care should have known of its existence and removed it, thereby making the aisle safe for customers.

Now, the defendant, in opposition, claims that there is no direct evidence that the defendant's employees dropped the strawberry on the floor, and indeed that is a fact, and he claims that no inference can be raised that an employee did drop the strawberry on the floor or that it came from this area of refuse or debris, because what the plaintiff saw in that area, as I recall her testimony, was ice, water and vegetable matter, and that this strawberry was some distance therefrom.

Defendant also contends further that there is no evidence that it had been there long enough to allow the store, in the exercise of reasonable care, to remove it.

Defendant further contends that if you should find that the defendant was negligent in any of these respects, plaintiff was contributorily negligent in not seeing something which was plainly there for her to see and at a time when she claimed she had her eyes on the floor, and that such negligence contributed in part, at least, to her fall.

Of course, a customer is not required to keep his eyes glued to the floor as he walks along the aisle of a [31] store floor, because the presumption is that the store is careful to keep the aisles reasonably safe.

On the other hand, there is also a presumption that the customers are exercising reasonable care in walking through the aisles of the floor.

Now, this defense of contributory negligence is an alternative defense and, of course, is inconsistent with the defense of not being negligent at all, but that is permitted under our system of jurisprudence and if it is established it absolves the defendant from liability.

There is no direct evidence that the defendant through its employee dropped the strawberry on the floor.

The defendant contends that it cannot be inferred that they did from the fact that some refuse was dropped in an area nearby, because, as I have said, this refuse they contend came from the vegetable stall and not from the fruit stall or bin or department.

Plaintiff contends that such an inference that it was dropped by an employee of the store can be made by reason of the fact that it was closing time and the employees of the store were packing away the vegetables and other perishable products for the ensuing Sunday when the store would not be open.

There is also no direct evidence that if the [32] strawberry was dropped by a customer it had been there for such a length of time as to reasonably put the store on notice of its presence.

The plaintiff contends that the fact that the store was about to close and that she saw no one else in the store at the time is sufficient to draw an inference that it had been there for such a time as to reasonably put them on notice of its existence, because of the cleaning-up operation, as testified to by the witness, Mr. Sample.

Defendant is not responsible unless you find that one of its employees did drop the strawberry on the floor or unless you find that they had actual notice that it had been dropped, that it was there, having been dropped by someone else, or it had been there for such a length of time that it reasonably should have cleared it away in the exercise of reasonable care.

Now, the essential elements of plaintiff's case, therefore, are as follows:

First, that plaintiff fell in the corridor or aisle of defendant's premises and injured herself.

There is no dispute on this point although the extent of her injuries caused by her fall are in dispute.

The second element is that in the aisle of the store was a strawberry dropped or left there by defendant's employee, [33] or if not dropped and left there by defendant's employee, was known to defendant's employees to be there, or if not known had been there for such a length of time that the defendant in the exercise of reasonable care should have known of its existence and corrected the condition.

The third element is that the existence of such strawberry created an unsafe condition for persons traversing the aisle.

The fourth element is that plaintiff in traversing the aisle slipped on the strawberry which proximately caused her to fall and injure herself.

Those are the four elements.

If you do not find that each and all of these essential elements have been established by a preponderance of the evidence, your verdict will be for the defendant.

If you do find that each and all of these essential elements have been established by a preponderance of the evidence, your verdict will be for the plaintiff, unless you find that defendant has established by a preponderance of the evidence the plaintiff was contributorily negligent, in part at least, in not observing the strawberry and avoiding it, and that such negligence on her part proximately caused, at least in part, the plaintiff to fall.

Now, if you find for the plaintiff you will come to [34] the question of damages. In this connection you will award her such sum as will fairly and reasonably compensate her for the damages sustained by her as a proximate result of the fall.

In this connection you will consider as an element of damage her pain and suffering, the reasonable value not to exceed the cost to the plaintiff of the care of physicians and clinical and hospital therapy and treatment, the cost of the corsets and the cost of transportation to and from the doctor's office or clinic.

You will also consider as an element of damage the reasonable value of the time lost by the plaintiff attributable to this injury. In determining the value of her time, you will consider how she was employed previously, which according to her own testimony, was performing the duties of a housewife in maintaining her home and caring for her children.

In estimating this value you will consider the cost to plaintiff of employing a maid during this period when she was unable to perform these duties, so far as you find they were attributable to the injury which she sustained.

But in no case will you award her damages for any loss of time after she sought and obtained a Government position in March of 1961, about nine months after the injury, because the plaintiff at that time, as was her duty under the [35] law to minimize her damage, not only minimized her damage on this account, but she actually eliminated her damage inasmuch as her salary from her Government position was in excess of the reasonable value of her time as a housewife.

Now, there have been two witnesses, physicians, who have testified. They are known in the law as expert witnesses. They have given you their opinions.

Ordinarily opinion testimony is not received in a court of law, but only facts, but there is an exception to that ordinary rule and that is in the case of experts.

An expert is a person who by education and study or experience has become versed in some art or science material to the case on trial and in that case he is permitted to give you his expert opinion as to that particular art or science.

Medicine is an art and a science and the two physicians have given you their testimony as to the condition of the plaintiff as they found it and the cause of her condition as they found it.

They differ in their conclusions. It will be necessary for you to weigh their testimony and give it such consideration as you think it is

entitled to, taking into account the opportunity of the physicians to reach the conclusions on which they base their testimony, their experience and the [36] reasons given for their opinions, and reach a correct conclusion in the exercise of your good judgment as to what is the correct conclusion.

Now, also you may consider as an element of damage such pain and suffering as she is reasonably likely to incur in the future. When I say pain and suffering, I mean mental anguish and impairment of ability to enjoy life as before the injury but only so far as you find that the pain and suffering and mental anguish and inability to enjoy life in the future is a proximate result of this fall.

Apparently from the evidence the plaintiff had had back trouble for some years previous to this fall, but the physician who treated her believed that at the time of the fall it was in a dormant condition and that her fall caused it to recur.

He testified through deposition that it was not an aggravation of a pre-existing condition but the recurrence of or bringing into existence that which was dormant at the time of the fall.

The fact that the plaintiff by reason of a previous back condition is predisposed to injuries does not relieve the defendant of liability, but the defendant would be liable for the entire damages which you find ensued even though the injuries resulting from the fall are more serious than they [37] otherwise would have been by reason of the pre-existing condition.

Defendant's doctor, who examined her just a year ago today, as I recall his testimony, came to the final conclusion that his examination showed that it was negative of any recent bone or joint injury.

I think the date of the deposition of Doctor Engh was a little earlier than that -- yes, that was in 1962 that he gave his deposition and that was his opinion, which differs from the opinion of Doctor O'Donnell in 1963.

There is no evidence of any examination at this time.

Now, if you find for the defendant, when the Clerk asks you how you find, you will say, "For the defendant," and that will end the matter.

If you find for the plaintiff, when the Clerk asks you how you find, you will then say, "For the plaintiff."

He will then say, "In what amount?" You will add to your verdict one lump sum, an amount which you arrived at under my instructions.

When you go to your jury room, you will first select your foreman. When you have reached your verdict, which must be unanimous, you will make that fact known to the Deputy Marshal in whose custody you will be, and he will inform me [38] and I shall assemble counsel and receive it.

Your verdict will be announced by your foreman unless the jury is polled, in which case each of you will be required to announce it.

It will be either for the plaintiff or the defendant. If for the plaintiff, it will be in one lump sum arrived at under my instructions.

I will hear objections at the Bench, gentlemen.

(Whereupon counsel approached the Bench and the following proceedings were held:)

MR. BIERBOWER: For the record, Your Honor, I will respectfully enter an objection to the Court's instructions that nothing can be awarded for the maid's services for the period beginning March 17, 1961.

THE COURT: That is the way I look at it.

MR. BIERBOWER: I understand that, Your Honor.

MR. CASEY: For the record, Your Honor, for the reasons expressed while arguing my motion for a directed verdict, I object to the instruction on the defendant causing the strawberry to be on the floor. I don't think there is evidence to support it. I say the same thing with regard to the Court's instruction on actual or constructive notice. I don't think the jury can find evidence to support that. I am sure Your Honor knows my reasons.

THE COURT: I know them.

[39] (Whereupon counsel resumed their places at the table and the following proceedings were held:)

THE COURT: The alternates will now be discharged to return to the jury lounge with expressions of appreciation.

The jury will now retire and commence their deliberations.

(Whereupon at 3:33 p.m. the jury retired to commence deliberations.)

[Filed October 30, 1964]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 29th day of October, 1964, before the Court and a jury of good and lawful persons of this district, to wit:

* * *

(names of jurors omitted)

who, after having been duly sworn to well and truly try the issues between Clare H. Madden, plaintiff and Giant Food, Inc., defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 30th day of October, 1964, that they find for the defendant against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense.

HARRY M. HULL, Clerk

* * *

Judge David A. Pine Presiding

[Filed November 27, 1964]

NOTICE OF APPEAL

Notice is hereby given this 27th day of November, 1964, that plaintiff Clare H. Madden hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of October, 1964 in favor of Giant Food, Inc. against said Clare H. Madden.

JAMES J. BIERBOWER
Attorney for Plaintiff

Clare H. Madden

[Filed November 27, 1964]

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Notice is hereby given this 27th day of November, 1964, that plaintiff Clare H. Madden hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of October, 1964 in favor of Giant Food, Inc. against said Clare H. Madden.

JAMES J. BIERBOWER
Attorney for Plaintiff

Clare H. Madden

[Filed November 27, 1964]

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JAMES J. BIERBOWER
Attorney for Plaintiff

Clare H. Madden

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,106

CLARE H. MADDEN,

Appellant,

v.

GIANT FOOD, INC.,

Appellee.

Appeal From the United States District Court
for the District of Columbia

JAMES J. BIERBOWER
Commonwealth Building
Washington 6, D.C.
Attorney for Appellant

Filed: March 25, 1965

STATEMENT OF QUESTIONS PRESENTED

1. Was appellant denied a fair and impartial trial of her personal injury suit by the repeated statements of appellee's counsel, in closing argument, that appellant is among those plaintiffs who assert unfounded and grossly exaggerated claims against "sitting duck" profit-making corporate defendants?

2. Was the jury's verdict as to liability prejudicially influenced, in a personal injury suit, by the court's charge precluding the jury's consideration of damages for wages paid for domestic and child care help after plaintiff became gainfully employed, where said wages constituted appellant's major item of damages, where the need for said help was the proximate result of injuries giving rise to appellant's suit, and where appellant took employment only to defray the expense of said assistance?

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TABLE OF CASES

Case

*Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,106

CLARE H. MADDEN,

Appellant,

v.

GIANT FOOD, INC.,

Appellee.

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a civil judgment in favor of appellee entered by The United States District Court for the District of Columbia on October 30, 1964. The District Court has jurisdiction by virtue of 11 D.C. Code 306. Appellant's notice of appeal and bond for costs on appeal were filed on November 27, 1964 (J.A. 40).

STATEMENT OF CASE

Appellant brought suit, on August 7, 1961, for damages arising out of permanent back injuries sustained on June 18, 1960, when she slipped and fell in the aisle of one of appellee's retail food stores (J.A. 1).

Appellant's complaint alleged that her injuries were the direct and proximate result of her slipping and falling on certain food debris on the aisle floor of appellee's store, and that appellee was culpably negligent in permitting such debris to be and remain on said floor (J.A. 2).

Appellee's answer denied that appellant's fall resulted from any negligence attributable to it, and averred that appellant's fall was caused by her sole or contributory negligence and her lack of due care (J.A. 3).

The case was tried on October 29 and 30, 1964, before Judge David A. Pine and a jury.

The jury returned a verdict for appellee on October 30, 1964, upon which verdict the court entered judgment for appellee on that same date (J.A. 39).

Plaintiff's Evidence

Appellant testified that she entered appellee's retail food store at 2154 Wisconsin Avenue, Washington, D. C., at about 8:45 p.m., Saturday, June 18, 1960, to purchase bananas and chocolate syrup.

While in the fresh produce department, according to appellant's testimony, she observed one of appellee's employees transferring perishable produce from the display counters to a wheeled, aluminum bin-like storage container. She asked the employee for the

location of chocolate syrup, whereupon the employee directed her to continue rearward along the same aisle. Appellant did so, taking the route which lay through the rear section of the produce department and which required appellant to traverse a portion of the aisle floor which was littered with ice, water and vegetable debris.

Appellant testified that she traversed said portion of the aisle with great care and caution because of its condition, and that, when she reached the point in that aisle abreast of a strawberry display table, she suddenly slipped and fell to the floor. While lying on the floor, according to appellant, she observed close to her thereon, a squashed strawberry and a blackish skid mark. Appellant testified that the strawberry display table contained one open, uncovered half-pint basket of strawberries.

Appellant testified that she was helped to her feet by two of appellee's employees, the butcher and the store manager, that her husband was summoned from his car outside the store, and that her husband and the store manager assisted appellant out of the store and into the car.

Arriving home, according to appellant, she telephoned her family doctor, who prescribed a hot bath and use of a heating pad to relieve the pain in appellant's sacroiliac area and the back of her left leg. Appellant testified that these pains persisted in succeeding days, that her family doctor examined her on Monday, June 20, 1960 and on June 22nd, and that, on the latter occasion, said physician recommended that she consult an orthopaedic surgeon.

Appellant testified that she then consulted Dr. O. Anderson Engh, that on June 25, 1960, Dr. Engh X-rayed her back and strapped it, that she underwent therapy about three times a week until about August 9, 1960, with additional periods of therapy thereafter, and she began wearing a steel-braced orthopaedic corset at Dr. Engh's pre-

scription. Appellant further testified that she still had to wear this garment constantly throughout the day and occasionally at night, as of the time of trial.

From the date of the accident until sometime in August 1960, appellant testified she was unable to perform even light housekeeping tasks or to take care of her seven children and was forced to spend a major part of the time in bed or lying on a couch. In August 1960, according to her testimony, appellant attempted to resume her household routine, but had to abandon the attempt due to an immediate increase in back pain and discomfort.

Appellant testified that, due to this physical incapacitation, it was necessary to employ full-time domestic help, one Rose Dolan, to do the housework and care for the children. Rose Dolan, according to appellant's testimony, performed this full-time work from about June 21, 1960 until about March 24, 1964, since which latter date she has continued to do appellant's heavy cleaning two or three days per week, because appellant still is unable to scrub floors or do any appreciable lifting or bending.

Appellant testified that, as of March 17, 1961, she took a sedentary job as a clerk in Department of the Navy, solely to offset the increasingly heavy financial burden of having a full-time housekeeper perform her accustomed household and child care functions. According to appellant, she left this job in March 1964, because she and her husband believed it was mandatory that she spend more time at home with the couple's seven children.

Appellant's husband corroborated her testimony, as set forth above, concerning all events and circumstances after the time he was summoned into appellee's store by the manager thereof on the night of June 18, 1960. The husband also testified, as did the couple's teenage son, that, since her accident, appellant has been unable to participate actively in the family's normal recreational activities –

badminton, swimming, etc. — and that she no longer can pursue her long-time hobby of gardening. Husband and son further stated that appellant had become tense and nervous — characteristics not a part of appellant's personality prior to her accident and injury.

Rose Dolan appeared as a witness and corroborated appellant's testimony as to the times, terms and circumstances regarding her employment by appellant to perform general housekeeping and child care. This witness also testified as to her observation of appellant's obvious physical discomfort and incapacitation, *e.g.*, appellant's inability to bend over and pick up her youngest child, who was only one and one-half years old at the time appellant was injured.

The expert testimony of Dr. O. Anderson Engh, the orthopaedic surgeon who treated appellant, was introduced through deposition. Dr. Engh testified in detail as to the nature of the injury sustained by appellant on June 18, 1960 and as to his protracted treatment thereof. Dr. Engh stated that appellant's fall on June 18, 1960 produced a recurrence of a dormant back condition, as opposed to an aggravation of a pre-existing condition. The witness also stated his expert opinion that appellant would be required to wear the special orthopaedic steel-braced corset indefinitely, to minimize appellant's continuing pain in the lumbar and lower thoracic areas.

Defendant's Evidence

Appellee did not deny that appellant fell while in appellee's premises on the night of June 18, 1960, but claimed that said fall, and any resultant injuries sustained by appellant, were the proximate result of her sole or contributory negligence and her failure to exercise reasonable care for her own safety. Appellee also offered the defense that appellant had a long history of back trouble and that any injuries sustained through the accident of June 18, 1960 were an aggravation of a pre-existing condition.

Appellee produced as a witness one of its employees, who, on June 18, 1960, was responsible for keeping the floor of the store in which appellant slipped and fell free of all dirt and debris. This porter testified that, on the night in question, he began sweeping the store aisles at about 8:10 p.m., and that it required about 15 minutes to clean all the aisles of that store. He stated that he thoroughly cleaned the aisle of the fresh produce department during this operation.

On cross-examination, this witness stated that it was routine for the transfer of the perishable produce from the display counters to the wheeled bin-type container for overnight refrigerator storage to begin at about 8:30 p.m. He further testified that some occasional spillage onto the floor of the produce department aisle does occur during this transfer. The witness also stated that he did not witness appellant's fall and did not know the condition of the produce department aisle floor at about 8:45 p.m., because at that time he was in a back room of the store preparing to depart for the night.

Appellee also produced as a witness its ex-employee who was its manager of the store in question on June 18, 1960. This witness could not recall appellant and did not remember that anyone had slipped and fallen in the store in question on June 18, 1960.

Through cross-examination of appellant, and through the deposition testimony of Dr. O. Anderson Engh, appellee adduced evidence that appellant had, on three prior occasions, in 1950, 1955 and 1959, been examined and treated by Dr. Engh for back complaints. Dr. Engh's testimony, however, attributed these earlier complaints to a postural condition, as distinguished from the traumatic injury appellant sustained in the fall of June 18, 1960.

Appellee's remaining witness was Dr. Paul J. O'Donnell, an orthopaedic specialist who examined appellant on or about October

30, 1963, at the instigation of appellee. He testified that his neuromuscular examination of appellant on that date was objectively negative. On cross-examination, the witness stated that he had not seen or examined appellant prior to about October 30, 1963 and that he did not have access to, or knowledge of, Dr. Engh's reports concerning the latter's examinations, diagnoses, treatments and prognoses of appellant's condition at the time of his examination. Dr. O'Donnell's testimony corroborated that of appellant's husband and son to the extent that he noted, during his examination of appellant, that she seemed to be a very nervous person.

STATEMENT OF POINTS

The following points are relied upon by the appellant:

1. Appellant was denied a fair and impartial trial by the repeated remarks of appellee's counsel, manifestly and improperly calculated to prejudice the jury, that appellant is among those plaintiffs who assert unfounded and grossly exaggerated claims against what counsel characterized as "sitting duck" corporate defendants.

2. The court below erred prejudicially in instructing the jury that it could not award damages to appellant for the cost of employing a maid after March 17, 1961, on which date appellant obtained employment with the United States Government.

SUMMARY OF ARGUMENT

I

Appellant made no attempt, through testimony or argument, to derogate appellee as a large, affluent and insensitive corporation. Appellant made no attempt to "remind" the jury that a large corporation of appellee's type normally is prepared for the consequences of accidents of the sort in which appellant was injured.

Appellee did not elect to conduct its defense with the same restraint. In his closing argument, counsel deliberately chose to appeal to the prejudices of the jury. At the outset, counsel characterized appellee as a "sitting duck", easy prey for the unscrupulous and avaricious among its invitee patrons. Counsel told the jury that the press has publicized the ease with which one may unjustly enrich himself by "picking on" a largely defenseless corporation such as appellee.

Next, counsel told the jury that litigants such as appellant come into court confident that the jury will share the view that large corporations have no rights and deserve no sympathy because they continually take the public's money and never give full value therefor. Further, counsel told the jury that such litigants as appellant believe jurors will not be business-like, will not remember the evidence, will be tricked by such litigant's counsel, will not understand the court's instructions and will fail to use common sense — in short, that litigants such as appellant believe that jurors are dull-witted and careless in discharging their duties.

Counsel then took advantage of a judicial technicality to confuse and mislead the jury. Knowing full well that appellant was bound by the special damages established at pretrial, and knowing too, that additional medical expenses had been incurred between pretrial and trial, counsel led the jury to believe that the disparity between these figures represented a groundless "blowing up" of appellant's damages.

Appellant submits that counsel for appellee did not confine himself to discussing the issues and the evidence, but deliberately sought to prejudice the jury against appellant by improper, groundless accusations that she was a liar, that she was litigating trumped-up charges and that she believed the jurors were stupid and careless. Appellant contends that these improprieties of counsel were so far beyond the acceptable limits of advocacy as to require reversal of the verdict and judgment below.

II

There was uncontroverted evidence that appellant required full-time housekeeping and child care service from the time of appellant's accident until March 1964. The evidence also was clear that the expense of this service constituted by far the largest single item of appellant's damages.

The court below directed the jurors that they could not award any damages based upon this expense, as representing the reasonable value of appellant's time as a housewife, for the three-year period during which appellant performed a sedentary Government clerk's job in order to be able to pay to have done the housekeeping and child care tasks which she was physically incapable of performing.

Appellant submits that this jury instruction was basically erroneous in view of the well-settled collateral source doctrine. More importantly, appellant contends that, by foreclosing jury consideration of this overwhelmingly large segment of her claimed damages, with only cursory, parenthetical mention of the doctrine of minimization of damages, the court led the jury to conclude that appellant's injuries were minor, of short duration, and, in fact, simply a manifestation of her earlier back trouble, rather than the proximate result of appellee's negligence.

It is possible that the court could have prevented the jury from arriving at a conclusion so much at variance with the evidence, had the court carefully instructed the jury as to the doctrine of minimization of damages. However, as the record clearly shows, no such instruction was given by the court. Therefore, appellant submits that the court's peremptory exclusion from jury consideration of what amounted to 95 per cent of her specific damages was prejudicial to appellant's whole case to an extent requiring reversal and remand.

ARGUMENT

I. Improprieties of Opposing Counsel in Closing Argument Deprived Appellant of a Fair and Impartial Trial. (J.A. 15 -27)

Appellee, in conducting its defense of this case, chose deliberately and improperly to arouse prejudice and resentment against appellant in the minds of the jury and to solicit jury sympathy for itself. Further, appellee improperly and knowingly used a judicial technicality to confuse and mislead the jury. These improprieties, as will be shown, were committed in the course of closing argument by appellee's counsel. Appellant contends that counsel departed inexcusably from comments upon the issues and evidence, and the inferences to be drawn therefrom, and that his deliberate and manifest appeal to the prejudice of the jury so far exceeded the bounds of legitimate advocacy as to deprive appellant of her right to a fair and impartial trial.

This Court made its view of this matter abundantly clear in *Washington & Georgetown R.R. v. Dashiell,* 7 App. D.C. 507 (1896), when it said, in part:

> ". . . [W]hen prejudice is the manifest object of the speaker, . . . it becomes matter of exception for review on appeal, when such remarks or comments are allowed by the trial court. That great prejudice and wrong is frequently effected by the improper and unwarrantable comments of counsel, made without the support of the evidence, and beyond and outside of the legitimate scope of the subject of inquiry, is beyond question; and, in recent times, the courts of the country have frequently been called upon to counteract and relieve against such undue prejudice, and its effects, by silencing counsel and setting aside verdicts. Counsel have no privilege to comment upon

> matter beyond the limits of the evidence before the jury for their consideration, with a view to creating prejudice and inducing a finding not justified by the evidence. It is upon the facts given in evidence to the jury, and those alone, that the verdict must depend for its support and validity, without reference to any extraneous matter that may be suggested by counsel . . . ." 7 App. D.C. at 516.[1]

Another pertinent statement of this principle is found in *London Guarantee & Accident Co. v. Woelfle*, 83 F.2d 325 (8th Cir. 1936), where the Eighth Circuit said:

> "In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, the applicable law, the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom." 83 F.2d at 342, citing *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F.2d 297, 302 (8th Cir. 1933).

At the very outset of his closing argument, counsel turned his back on the evidence and issues and told the jury that magazine, newspaper and Sunday supplement articles have publicized the "get-rich-quick" possibilities afforded by a personal injury suit against a corporation of the type represented by appellee (J.A. 16).

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[1] This Court has been consistently and particularly responsive to the requirements of a fair and impartial trial, unmarred by excessive zeal or impropriety of counsel. See *Dixon v. United States*, 112 U.S. App. D.C. 366, 303 F.2d 226 (new trial ordered where cross-examination went beyond direct prejudicially to defendant, even though defense counsel failed to object.) See also *Arpan v. United States*, 260 F.2d 649 (8th Cir. 1958), contrasted with *Ewing v. United States*, 77 U.S. App. D.C. 14, 135 F.2d 633, cert. denied, 318 U.S. 776; and *White v. United States*, 114 U.S. App. D. C. 238, 314 F.2d 243, decided November 22, 1962 (this Court reversed larceny conviction because prosecutor called jury's attention to defendant's failure to take the stand); and *Smith v. United States*, 114 U.S. App. D.C. 140, 312 F.2d 867, decided December 13, 1962 (this Court found prosecutor had made improper and prejudicial remarks about a medical report which had not been placed in evidence.)

There was, of course, no evidence in the case to establish the existence of these alleged articles, much less any evidence that appellant ever had seen, heard of, or been persuaded by any such writings. But this fact did not deter counsel from insinuating to the jury that appellant had brought her suit against appellee, not seeking just compensation for injuries sustained, but hoping "to achieve an endowment." (J.A. 16)

Having given the jury the idea that appellant's case was a prospecting venture or a quest for a gratuity, counsel next told the jury that, in a personal injury case, appellee was a "sitting duck", *i.e.*, a prime target for one who hunts in total disregard of the rules (J.A. 16, 20). Counsel stated that appellee occupied this vulnerable position because it was a profit-making corporation which invited the public into its premises in great numbers, and that such corporations have great difficulty in producing witnesses to testify in detail as to occurrences four years in the past (J.A. 16).

Here again, counsel's manifest intent was to prejudice the jury against the appellant, by depicting her as one who comes into court seeking easy money by "picking on" an affluent corporate defendant which, by its nature, is ill-equipped to assert an effective defense.

Counsel's characterization of appellee as a "sitting duck" with little capability for self-defense also was a clear bid for the sympathy of the jury. And to this extent, it was the reverse application of the tactic which led, in part, to the overturning by the Eighth Circuit of a judgment below for plaintiff in *London Guarantee & Accident Co. v. Woelfle, supra.* There, plaintiff's counsel, in closing argument, kept before the jury the fact that plaintiff was a widow, referred to the decedent's estate as "this man's little estate", and ended his argument with:

> "Remember, gentlemen, this is one case for this widow; it is an ordinary case for this company. See justice between them, gentlemen, see that justice is done; . . ."

Counsel next sought to turn the jury against appellant by stating that plaintiffs bringing personal injury suits against large corporations come into court confident that the jury will not be fair and objective in their consideration of the case, but will welcome the opportunity to understand and be unduly sympathetic to the human being and blind and unsympathetic to the rights of the corporate defendant, the "big outfit", the "money maker", the "organization" that continually takes the public's money and never gives full value in return (J.A. 16-17).

Appellant submits that this imputation to her of confidence in the anti-corporation bias of the jury not only was totally groundless, but was a deliberate and improper attempt by counsel to arouse the jury's resentment and indignation at hearing that appellant believed that they would, because of such bias, violate their oaths and fail to be fair and impartial in discharging their duties as jurors.

Continuing to employ this flagrantly improper tactic, counsel next told the jury that plaintiffs such as appellant, "seeking awards for personal injuries", come into court believing that the jury will be:

(1) Indifferent and casual in discharging their duties – ". . . [T]hey [plaintiffs in personal injury cases] don't suspect that a jury will look at their case with the same purposeful, business-like attitude that they go about the important decisions in their personal lives – . . . ." (J.A. 17)

(2) Forgetful as to the trial proceedings – ". . . [T]he jury won't look at their presentation with an accurate memory of what the evidence actually was – . . . ." (J.A. 17).

(3) Incapable of understanding the court's instructions – "[T]he jury won't comprehend the burden of proof and other principles of law that will be given to the jury by the Court – . . . ." (J.A. 17)

(4) Purposely unreasoning and unrealistic in its deliberations in the jury room — "[T]he jury will deprive itself of the third valuable tool for utilization in the jury room, the jury's common sense —." (Emphasis added) (J.A. 17)

Appellant submits that in thus attributing to appellant so low and disparaging an opinion of the jury's integrity and capability, counsel for appellee knowingly and purposefully sought to arouse the anger and resentment of the jury. And appellant contends that this grossly improper appeal to the jury's pride and prejudice, in and of itself, deprived her of a fair and impartial trial on the merits of her case.

In *Chicago & N.W. Ry. v. Kelly*, 84 F.2d 569 (8th Cir. 1936), the court made the following statement:

> ". . . The truth is that when a lawyer departs from the path of legitimate argument, he does so at his own peril and that of his client, and if his argument is both improper and prejudicial, then he has destroyed any favorable verdict that his client may obtain, unless, in some way, his error has been cured prior to the submission of the case to the jury." 84 F.2d at 573.

In the case cited above, the Eighth Circuit reversed a verdict and judgment for plaintiff because his counsel's closing argument included a labeling of the defense as "trumped up", reference to the fact that defendant had taken two statements from one witness (neither of which was introduced in evidence), criticism of the length of time defendant consumed in putting on its case, allusion to counsel's knowledge of how the defense of a personal injury suit evolves, and insinuation that at least one defense witness lied out of fear of losing his job.

Appellant submits that few, if any, of the remarks by counsel in the *Chicago and N.W. Ry.* case, *supra*, strayed as far from the issues and evidence as did the heretofore noted remarks by counsel in instant

case. And, certainly, none of the comments of Kelly's counsel approached the degree of impropriety reached here, where counsel told the jury that appellant had come into court seeking an "endowment" from a "sitting duck" corporation, confident that the jury would reflect its anti-corporation bias in its verdict and judgment, and equally sure that the jury would be unbusiness-like, forgetful, lacking in comprehension, and devoid of common sense.

As was said by the court in *Tashjian v. Boston & Maine R.R.*, 80 F.2d 320 (1st Cir. 1935):

> ". . . The function of the argument is . . . to state the contentions of the party on the law and on the facts . . . [I]t must be a fair presentation of a party's case and claims . . . [I]t must be confined to the evidence and must not appeal to passion or prejudice or sympathy in an unfair way . . . ." 80 F.2d at 321.

In *Union Pacific R.R. v. Field*, 137 Fed. 14 (8th Cir. 1905), cited with approval by the Supreme Court in *New York Cent. R.R. v. Johnson*, 279 U.S. 310 (1928), J. Sanborn stated, in part:

> "It is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts, insinuations of misleading rules of action, or arguments which arouse passion or prejudice; and yet in cases in which the address of counsel conveys suggestions of this nature to the minds of the triers of the facts it is only when it is certain that these have been withdrawn that the trial is fair and impartial. It is therefore of the gravest importance that the conveyance of such suggestions to their minds should be prevented at the very threshold of the attempt, and that court and counsel should guard the jury with zealous care against all illegal, improper, or unfair arguments or suggestions." 137 Fed. at 16.

This statement applies not only to the remarks of counsel hereinbefore discussed but also to his subsequent groundless accusation that appellant had wrongfully and deliberately misrepresented and exaggerated the nature and extent of her injury and the amount of her specific damages.

> ". . . [T]hey tried and did just what I told you so many believe is successful before a jury. They painted the big claim against the sitting duck corporate defendant." (J.A. 20)

The *Union Pacific* decision, *supra,* also contains this pertinent quotation:

> "The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts in jury trials to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel perservere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court." 137 Fed. at 17, quoting *Brown v. Swineford,* 44 Wis. at 293.

Counsel also adopted the improper tactic of attempting to confuse and mislead the jury by accusing appellant of an attempt to exaggerate her specific damages for medical care and treatment. Counsel was well aware that appellant, pursuant to Rule 12, Rules of the United

States District Court for the District of Columbia, was limited, in claiming specific damages for the expenses incurred for medical care and treatment, to such amounts as were established at pretrial. Counsel also knew that, between pretrial and trial, appellant had incurred additional medical expenses, which brought the actual total of such expenses to nearly $500.00 as of the time of trial, which fact was mentioned by appellant's counsel.

Having this knowledge, and knowing full well that the disparity between the approximation of $500.00 and the amount of specific medical expenses claimable at trial stemmed from a technical rule of legal procedure beyond the scope of the jury's knowledge, counsel deliberately and improperly told the jury that this same disparity exemplified appellant's exaggeration of her claim (J.A. 21)

As was said by the Eighth Circuit:

> "A trial is not fair and impartial in which the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury may have had an influence favorable to his client . . . ." *Union Pacific R.R. v. Field,* 137 Fed. at 15.

Appellant contends that the improprieties of appellee's counsel, as discussed above, clearly place this case within the spirit and policy enunciated by this Court in *Washington & Georgetown R.R. v. Dashiell, supra,* and submits that the verdict and judgment below should be reversed and the case remanded for a fair and impartial trial.

As to appellant's right to raise this issue on appeal, it has repeatedly been held that the failure to except to objectionable remarks in argument does not preclude an appellate court from correcting such errors. *London Guarantee & Accident Co. v. Woelfle, supra;* and see *Chicago & N.W. R. v. Kelly, supra; Aetna Life Ins. Co. v. Kelley,* 70

F.2d 589 (8th Cir. 1934); *New York Central R.R. v. Johnson,* 279 U.S. 310, 49 Sup. Ct. 300; *Maryland Casualty Co. v. Reid,* 76 F.2d 30 (5th Cir. 1935).

On the basis of these holdings, appellant submits that this basis for her appeal clearly is within this Court's scope of appellate review.

II. Court's Jury Charge Barring Major Item of Special Damages Was Erroneous and Prejudiced Jury's Verdict. (J.A. 28-39)

By far the largest single item of special damages claimed by appellant was the cost of employing domestic help to perform housekeeping and child care duties, which duties appellant could not perform after her fall and injury on June 18, 1960. At the time of trial, this cost totaled $8,787.00, or slightly more than 95 percent of appellant's total of $9,208.00 in special damages.

Appellant and other witnesses offered uncontroverted evidence that, as the proximate result of her fall and injury in appellee's premises on June 18, 1960, appellant was physically incapable of performing her own household chores and caring for her own children, as she had done since at least 1946. She was, to all intent and purpose, bedridden for several weeks, and thereafter, although ambulatory, she could not bend or lift or be on her feet for any length of time. Therefore, from about June 20, 1960 until about March 24, 1964, appellant necessarily employed a full-time housekeeper.

On March 17, 1961, appellant obtained a sedentary clerk's job in The Bureau of Weapons, Department of the Navy, solely in order to ease the increasingly serious family financial burden of the housekeeper's wages. In March 1964, appellant resigned from her job because she and her husband believed it mandatory that she spend more

time with the couple's seven children. Since March 1964, appellant has attended to light housekeeping tasks, with the housekeeper coming two or three days per week to do the heavy work.

In charging the jury as to damages, the court below foreclosed jury consideration of damages for time lost from her normal duties as a housewife as of the date appellant took the Government job, thus barring recovery of this item of damages with respect to 36 months of the total of 45 months during which appellant required full-time domestic help. (J.A. 36)

Appellant submits that this drastic elimination of four-fifths of appellant's major claim for special damages, without a full explanation by the court of the rationale of its peremptory action, prejudicially influenced the jury's view of the basic merits of appellant's complaint.

Appellant contends that the court's action led the jury to conclude that her ailment was, as appellee claimed, minimal, not the proximate result of slipping on a strawberry, but only the predictable continuation of the minor back problems which appellee's counsel had just discussed at length —". . .[A] long series of back discomforts over fourteen years . . . ." (J.A.21); also (J.A. 22-24)

The record clearly shows that the court did not carefully explain to the jury its reason for eliminating over $7,000.00 in damages from the jury's consideration. The subject of appellant's duty to minimize her damages was given only the most cursory, parenthetical mention. (J.A. 36) And there is no indication that the jury was in any wise familiar with this rule of law. Absent a thorough familiarity with, and understanding of, the rule being applied by the court, appellant contends that the court's charge on the aforementioned element of damages clearly was insufficient, misleading and prejudicial to appellant.

Appellant submits that this insufficient jury charge was rendered even more damaging in this case by reason of the improper accusations by appellee's counsel, hereinbefore discussed, that appellant had come into court, not with a valid claim, but seeking an "endowment" from a "sitting duck" corporation. Therefore, appellant submits that the trial court, in giving the aforementioned jury charge in the form discussed above, committed a prejudicial error warranting and requiring reversal and remand of her case.

Frederick et ux v. Yellow Cab Co. of Philadelphia, 200 F.2d 483 (3rd Cir. 1952) was a personal injury case in which plaintiff was injured when defendant's taxi suddenly moved while she was alighting therefrom. On appeal, defendant contended that a jury instruction that the cab driver should have opened the cab door and assisted plaintiff in alighting had led the jury to find defendant liable on a theory not urged by anyone during trial. The Third Circuit denied this argument in the case before it, but did explain that a jury charge would be reversible error in an appropriate case" . . . if it seems likely that as a result thereof the jury imposed liability on a theory which no one urged and which the evidence in no way supported." 200 F.2d at 486.

Appellant contends that, in instant case, the aforementioned jury charge, in the form and circumstances in which it was given, resulted in a finding of no liability, contrary to the evidence, and that, therefore, said jury charge was reversible error.

Appellant further contends that the court's aforementioned jury instruction, barring the award of damages for time lost from her normal duties during appellant's employment as a Government clerk, was not consonant with the collateral source doctrine as it has been applied by this Court and in other jurisdictions.

In *Hudson v. Lazarus*, 95 U.S. App. D.C. 16, 217 F.2d 344, this Court stated:

> " . . . [A]n injured person may usually recover in full from a wrongdoer regardless of anything he may get from a 'collateral source' unconnected with the wrongdoer. Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted . . . ." 95 U.S. App. D. C. at 18-19.

This Court applied that doctrine in *Geffen v. Winer*, 100 U.S. App. D.C. 286, 244 F.2d 375. There, the court below had refused to instruct the jury that it should consider the reasonable value of the time plaintiff lost from his regular employment, notwithstanding that plaintiff was paid the full amount of his salary for the period (over 20 weeks) during which he was unable to work.

In reversing and remanding the case, this Court said:

> "[T]he denial of the requested instruction was error which requires reversal, notwithstanding appellant was paid the amount of his salary for the period he was unable to work." 100 U.S. App. D. C. at 287.

The following quotation is taken from *Rayfield v. Lawrence*, 253 F.2d 209 (4th Cir. 1958):

> "It is well settled in most jurisdictions including Virginia . . . that an injured person may recover in full from a wrongdoer regardless of any compensation he may receive from a collateral source." 253 F.2d at 213.

The Court in the *Rayfield* case, *supra*, cited *Owen v. Dixon*, 175 S.E. 41, 162 Va. 601, wherein it was said:

> "The reason for the [collateral source] rule is that the wrongdoer must compensate the injured party for the injury he has committed, without any reference to other compensation. In other words, if the defendant is liable in damages, the extent of his liability is not to be measured by deducting financial benefits received by plaintiff from collateral sources."

See also the following cases cited by this Court in *Geffen v. Winer, supra: Siebrand v. Gossnell,* 234 F.2d 81 (9th Cir. 1956); *Shea v. Rettie,* 192 N.E. 44, 287 Mass. 454; *Motts v. Michigan Cab Co.,* 264 N.W. 855, 274 Mich. 437; *Cooney v. Hughes,* 34 N.E. 2d 566, 310 Ill. App. 371. And see *Plank v. Summers,* 102 A.2d 262, 203 Md. 552 (1954).

In *Taylor v. Monongahela Ry.,* 155 F.Supp. 601, affirmed 256 F.2d 751 (3rd Cir. 1958), plaintiff was injured while employed as a flagman on defendant's train. The Third Circuit affirmed a jury verdict and judgment for plaintiff below in the amount of $45,000.00, despite the fact that, although plaintiff no longer could work as a brakeman or flagman, he had qualified as a train dispatcher and subsequently earned more in that job than he had previously earned.

The Third Circuit in the *Taylor* case, *supra,* quoted with approval from *Saganowich v. Hachikian,* 35 A.2d 343, 348 Pa. 313 (1944), as follows:

> "Damages for loss of earning capacity arise out of an impairment of that capacity, and not out of loss of earnings. The earnings of the plaintiff subsequent to the injury, as compared with his earnings at the time of the injury, are merely evidence, but not conclusive evidence, as to whether his earning power has been diminished by the accident. The matter was clearly for the jury."

Appellant contends that the question of damages for the time lost from her normal employment, *i.e.,* maintaining her household and car-

ing for her children, during the period from March 1961 to March 1964, clearly was a proper matter for consideration by the jury, under the collateral source doctrine. Appellant submits that this is especially true in her case, since the financial benefits received by her from a collateral source during that period were neither a gratuity, nor insurance benefits, nor yet a continuation of wages under a paid sick leave provision of a pre-existing employment contract. Rather, appellant's collateral source compensation consisted of wages from a sedentary clerk's job which she was forced to take to defray the weekly expense of having someone else perform the household and child care tasks she was incapable of performing due to the injury sustained in appellee's premises.

Appellant respectfully submits, both in light of the collateral source doctrine and because of its adverse effect upon the jury's consideration of the basic issue of liability, the trial court's jury instruction, foreclosing award of damages for time lost in the period March 1961 to March 1964, constituted prejudicial error requiring reversal and remand of her case.

CONCLUSION

Appellant respectfully requests that this Court reverse and remand the case for further proceedings consistent with such opinion as this Court may issue.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,106

CLARE H. MADDEN

Appellant

v.

GIANT FOOD, INC.

Appellee

Appeal From the United States District Court for the District of Columbia

FRANCIS L. CASEY, JR.

PIERRE J. LaFORCE

815 Connecticut Avenue
Washington, D. C.

Attorneys for Appellee

HOGAN & HARTSON

Of Counsel

QUESTIONS PRESENTED

1. Should this Court exercise its review power where the record designated by appellant does not contain any of the testimony or evidence produced at trial or the appellant's summation?

2. Did not appellant waive her right to urge the impropriety of appellee's argument on appeal when appellant failed to object thereto below?

3. On the basis of the record presented, was not appellee's argument a permissible and legitimate one?

4. Whether, on the basis of the record presented, the court's charge on damages prejudiced appellant on the issue of liability?

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TABLE OF CASES

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*Cases chiefly relied on.

TREATISES

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

This case arose from a fall suffered by appellant in one of appellee's stores. At trial, appellee's counsel, in his summation, urged the jury to consider the case dispassionately, without sympathy or favor for either party. (J.A. 15-27) The trial court, in its charge, instructed the jury that, if the jury should reach the question of damages, it should eliminate from consideration the wages paid to a maid during the pe-

riod of appellant's employment with the government. (J.A. 36) The jury returned a verdict for defendant and judgment was entered thereon. (J.A. 39) Appeal was seasonably filed by plaintiff. (J.A. 40) Appellee moved to dismiss the appeal on the grounds that (1) appellant had failed to object to appellee's summation at trial and was precluded from appealing therefrom and (2) appellant's claim that a damage instruction was erroneous was moot in that the jury returned a verdict for appellee on the issue of liability. This Court ordered that the motion be held in abeyance pending a hearing of the appeal on the merits.

Appellee does not subscribe to any additional statements of fact concerning the conduct of this case which might appear in appellant's brief. Said brief consists largely of factual statements which are not to be found in the record. See Part I hereof.

SUMMARY OF ARGUMENT

In appealing from a jury verdict and judgment for appellee, appellant has prepared and filed with this Court only that portion of the trial transcript containing the closing argument of appellee and the trial court's charge to the jury. Such a record is clearly inadequate to warrant review by this Court of the questions presented by appellant.

The law is clear that failure to object at trial to closing argument of counsel precludes appellate review of the propriety of such argument, except in the most unusual of circumstances. The record filed in the instant case shows no such unusual circumstances.

The propriety of argument of counsel is to be judged on the basis of the evidence in the case and the argument of opposing counsel. Appellant has not included these items in the record and the record does not show prejudice or impropriety. Further, an examination of appellee's argument conclusively demonstrates that it was perfectly proper and legitimate.

The trial court's charge to the jury was correct. No prejudicial effect could inure to appellant from a damages instruction, even an erroneous one, since the jury found for appellee on the liability issue. Further, appellant's claim of prejudice is in no way supported by the record. Appellant's reliance on the collateral source doctrine is misplaced inasmuch as that doctrine has no applicability to the issues in the instant case.

ARGUMENT

I. The Record Filed in the Instant Case Is Inadequate To Permit Exercise of the Review Power of This Court.

In the instant appeal the closing argument of appellee and the court's charge to the jury are the only portions of the trial transcript prepared and filed with this Court by appellant. None of the testimony or evidence produced at trial is presented. Nonetheless, in plain contravention of the dictates of this Court, appellant presents in her brief factual statements which are in no way supported by the record. This Court has on many occasions discussed the impropriety of such a procedure and indicated that failure of an appellant to present a sufficient record warrants dismissal of the appeal.

For example, it was said in *T.V.T. Corp. v. Basiliko,* 103 U.S. App. D.C. 181, 257 F.2d 185 (1958):

> The difficulty with appellants' position here is that they have not given this court an adequate record for considering their claims . . . .
>
> "All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error ...."

> On this appeal appellants have given us as a record only the pleadings in the instant case, the motions for summary judgment, the judgments entered, and the notice of appeal. Under the circumstances, this is plainly insufficient.
>
> * * *
>
> It is the duty of the appellants to designate and file a record sufficient to enable us to pass on the errors of law they claim were committed below. [*Id.* at 183, 257 F.2d at 187.]

An earlier Court voiced similar sentiments. In *Newman v. Newman*, 35 App. D.C. 497 (1910), it was stated at 500:

> It is the duty of an appellant to file a sufficient transcript of the proceedings in the court below to enable this court to decide all the questions that may be properly presented . . . . Failing in this duty, the court may dismiss the appeal, or require, in a proper case, that the defect be supplied; or it may affirm the judgment or decree upon such insufficient transcript.

The Court continued at 501:

> *If there had been no motion to dismiss, and the case was before us regularly for hearing, we could do nothing but affirm the decree,* because of the absence of anything in the record by which its correctness could be tested. [Emphasis added.]

Likewise, in *Spruill v. Crawford*, 64 App. D.C. 118, 75 F.2d 522 (1934), *cert. denied*, 294 U.S. 714 (1935), the Court held:

> The record, however, does not contain any of the testimony introduced at the trial, nor does it show any objection or exception then taken by the plaintiff to any ruling of the court upon any question arising in the case, nor does the record contain any bill of exceptions. We are therefore unable properly to review the questions arising at the trial and cannot do otherwise than affirm the judgment of the trial court. [*Ibid.*]

Accord, O'Neal v. Cowles Magazines, Inc., 96 U.S. App. D.C. 204, 206, 225 F.2d 43, 45 (1955); *White v. Central Dispensary & Emergency Hosp.*, 69 App. D.C. 122, 126, 99 F.2d 355, 359 (1938); *Casey v. Smith*, 32 App. D.C. 193, 195 (1908); 3A Barron & Holtzoff, *Federal Practice and Procedure* § 1590 (1958).

The Municipal Court of Appeals for the District of Columbia likewise deplored this practice. In *Jaffe v. Sterrett Operating Servs., Inc.*, 76 A.2d 780 (Munic. Ct. App. D.C. 1950), that court said:

> Appellant's brief contains a statement of facts, but such statement is wholly unsupported by the record. *Obviously a case on appeal must be decided on the record and not on the briefs.* Since the record presents no question for review the appeal must be dismissed. [Emphasis added.]

This view was reiterated in *Pinkston v. Carter*, 150 A.2d 629 (Munic. Ct. App. D.C. 1959), where it was held, 150 A.2d at 632:

> Turning to assignments of error which challenge the correctness of the decision below, it needs to be said that in appellant's brief there is a formidable array of factual statements which are not to be found in the record. It also needs to be said, as has been done time and again, that *appellate review must be limited to matters in the official transcript of record and cannot be based on statements of counsel which speak against the record either by way of contradiction or by unauthorized addition thereto.* [Emphasis added.]

The cases also conclusively indicate that, absent a sufficient record, the specific assignments of error presented by appellant cannot be considered. One of appellant's arguments is that the trial court erroneously refused to instruct the jury to consider certain special damages. The identical issue was presented in *Higgins v. Dail*, 61 A.2d 38 (Munic. Ct. App. D.C. 1948). There also the appellant did not include in the record any evidence concerning such special damages. The court held, 61 A.2d at 39:

> The second assignment relates to the trial court's refusal to allow the jury to consider two items of claimed special damages . . . . *However, the record discloses no evidence regarding this item and we cannot consider it.* [Emphasis added.]

Appellant devotes a substantial portion of her brief to the claim that the closing argument of appellee was improper and prejudicial. Yet, appellant has only included in the record a transcript of this argument and has omitted her counsel's argument and all of the testimony and evidence presented at trial. In similar instances it has been held that failure to include the evidence in the case and *both* arguments will result in summary affirmance or in dismissal of such an assignment of error. It was said in *London Guar. & Acc. Co. v. Woelfle*, 83 F.2d 325, 344 (8th Cir. 1936), a case chiefly relied upon by appellant:

> When . . . an appeal is taken, the bill of exceptions should contain all of the closing arguments. This is necessary because we have already held that where improper argument was or may have been invited or provoked by the argument of opposing counsel, we would not reverse . . . .
>
> [W]e think it is not ordinarily possible, on appeal, to determine the true extent of the alleged misconduct or its probable effect unless this court has before it all that was said to the jury by counsel on both sides.

See *Haigler v. Logan Motor Co.*, 86 A.2d 108, 109 (Munic. Ct. App. D.C. 1952); *Brown v. Haas*, 72 A.2d 39, 40 (Munic. Ct. App. D.C. 1950).

Appellant has in effect deprived this Court of any basis upon which to review the rulings of the trial court. As hereinbefore noted, appellant cannot fill these factual gaps by means of her version of the trial proceedings. The total absence in the record of the underlying facts clearly indicates the frivolity of this appeal. Consequently, on this ground alone, the Court should dismiss the instant appeal or summarily affirm the judgment of the trial court.

II. The Propriety of Appellee's Argument Is Not Properly Before This Court.[1]

The record in the instant case does not show any objection by appellant to the much-maligned closing argument of appellee. In fact, appellant tacitly admits that there was none. (Brief for Appellant at 17-18).

It is, of course, elementary law, dating from the earliest days of the common law, that in order to preserve a point on appeal, objection or exception must be taken at the trial to the alleged error. This general principle has often been applied to assignments of error dealing with the propriety of closing argument of counsel. The general rule was set forth in *Thomson v. Boles,* 123 F.2d 487 (8th Cir. 1941), *cert. denied,* 315 U.S. 804 (1942), where the appellant contended that the argument of opposing counsel was improper. The court noted that there had been no objection or exception at trial and quoted from *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 238-39 (1940):

> "* * * In the first place, counsel . . . cannot as a rule remain silent, interpose no objections, and after a verdict has been returned, seize for the first time on the point that the comments to the jury were improper and prejudicial."[2]

The Court then went on to state, 123 F.2d at 496:

> [C]ounsel must either make an objection or take an exception or move for a mistrial at the time of the alleged misconduct, or where it involves a closing

---

[1] Appellee by no means concedes or admits impropriety in the argument of its counsel. See part III.

[2] In a similar vein, the Supreme Court noted in *Crompton v. United States*, 138 U.S. 361, 364 (1891): "It is the duty of . . . counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception."

> argument, counsel may, and preferably should, make his objection, take his exception, or ask for remedial action at the close thereof and before the case is submitted to the jury.

The rationale of this salutary rule was explained in *Chicago & N.W. Ry. v. Green,* 164 F.2d 55, 64 (8th Cir. 1947), where the court stated:

> A party is not entitled as a matter of right to seek a reversal for improper argument to the jury where he fails to make objections during or to take exceptions promptly at its close. One of the reasons for the rule is to enable the trial court to deal with the matter while it is fresh and to permit it to make any formal or informal additions to its instructions, if it deems this necessary.

Still another reason presented by the courts for requiring objection at trial is that "One cannot take his chance on a favorable verdict reserving a right to impeach it if it happens to go the other way." *Meyer v. Capital Transit Co.*, 32 A.2d 392, 393-94 (Munic. Ct. App. D.C. 1943); *accord, Union Elec. Light & Power Co. v. Snyder Estate Co.*, 65 F.2d 297, 301-02 (8th Cir. 1933).

The general rule, as set forth above, is the law in the District of Columbia. In *McWilliams v. Lewis,* 75 U.S. App. D.C. 153, 125 F.2d 200 (1941), the Court held that since appellant had not raised the question of improper argument at trial the point was in effect waived. *Id.* at 154, 125 F.2d at 201. The other District of Columbia authorities are to the same effect. *Simpson v. Stein,* 52 App. D.C. 137, 139, 284 Fed. 731, 733 (1922); *Taylor v. James,* 85 A.2d 62, 64-65 (Munic. Ct. App. D.C. 1951); *Meyer v. Capital Transit Co., supra* at 393-94.

In Maryland the rule was stated by its Court of Appeals in *Brinand v. Denzik,* 226 Md. 287, 173 A.2d 203, 205-06 (1961):

> The record discloses that the appellant did not ask the trial court to declare a mistrial when the remarks were made, and did not then or at any time before the jury retired request the court to instruct the jury to disregard them. This being so, she has waived her right to object to the verdict. *She has preserved no ground for appeal and therefore this appeal raises no question of law.* Clearly, if the appellant desired to protect herself against the possibility that the questionable remarks might influence the minds of the jurors, she had only to request the court to give a further instruction to the jury, fully and clearly advising them that the argument was not based on the evidence, and that therefore they could not base the verdict, or any part of it, on that argument. If such instruction had been requested and denied, the matter would have been preserved for review on appeal. [Emphasis added.]

And, this is the uniform rule in the federal courts. See, *e.g.*, *St. Louis Southwestern Ry. v. Ferguson,* 182 F.2d 949, 953-54 (8th Cir. 1950); *Tashjian v. Boston & M.R.R.*, 80 F.2d 320, 321 (1st Cir. 1935).

It has been stated by the courts that failure to object will not always preclude review by an appellate court. But, the courts are careful to note that such a power should not be exercised except under the "most unusual circumstances." See *London Guar. & Acc. Co. v. Woelfle, supra* at 344; *St. Louis Southwestern Ry. v. Ferguson, supra* at 953-54.

Nor do the cases cited by appellant at pp. 17-18 of her brief indicate a contrary rule. Indeed these cases support appellee's contention. Further, in each of these cases there was timely objection to the allegedly improper argument.

Clearly, therefore, it must be found that appellant's failure to object at any time at the trial foreclosed her right to present this point on appeal. Surely the extremely sketchy record which she has des-

ignated does not indicate the "most unusual circumstances" which would justify this Court in deviating from the general rule set forth herein.

III. Appellee's Closing Argument Was Not Improper.

Appellant's wholesale denunciation of the conduct of appellee's counsel is seemingly based on an assumption that appellee's counsel "departed inexcusably from comments upon the issues and evidence, and the inferences to be drawn therefrom . . . ." Significantly enough, appellant has not seen fit to provide this Court with an understandable record revealing the issues and evidence in the instant case. Appellee submits that appellant is in no position to urge on this Court that appellee's argument departed from the issues and evidence.

In *Haigler v. Logan Motor Co., supra* at 109, the court noted:

> The record brought here by appellant contains argument of appellee's counsel *but does not contain the evidence in the case, the argument for appellant* or the judge's charge to the jury. Arguments to a jury ought to be fair and based on the evidence or on that which may be properly inferred from the evidence, *but whether an argument is fair or based on the evidence cannot be determined, except in extreme cases, without viewing the argument in the light of the evidence and other proceedings in the trial.* On the record before us we cannot say that the argument was either unfair or unjustified by the evidence or constituted prejudicial error. [Emphasis added. See also Part I.]

In her hindsighted analysis of said closing argument, appellant chooses to ignore the beginning paragraphs of said argument. A cursory reading of these will disclose that appellee's counsel prefaced his remarks to the jury by explaining to the jury his position and partiality as an advocate and his interest in the outcome of the litigation. Such a reading will further show that counsel stated to the jury that they would

be entirely justified in viewing his statements with the proper measure of suspicion. (J.A. 15-16) Appellant also significantly omits any mention of the court's charge to the jury which charge clearly stated to the jury that sympathy or prejudice should not enter into their thinking or in the verdict; that appellant and appellee were entitled to equal treatment in the eyes of the law; that arguments of counsel did not constitute evidence; that each counsel was an advocate and the jury should consider the respective summations in the light of that advocacy. (J.A. 29-30)

Appellant complains loudly of appellee's reference, in its closing argument, to the rather well-understood sympathy factor in personal injury litigation against corporations. A similar objection was made by the defendant in *United Verde Extension Mining Co. v. Littlejohn,* 279 Fed. 223 (9th Cir. 1922), where plaintiff's counsel had referred, in his summation, to the declining purchasing power of the dollar. The Court of Appeals rejected this contention, stating at 233:

> Jurors may be reminded of what every one else knows and they may act upon and take notice of these facts which are of such general notoriety as to be matters of common knowledge.

Appellant also seeks to ascribe sinister motives to appellee's use of the hyperboles "endowment" and "sitting duck." Through a tortuous reasoning process which defies common sense, appellant contends that appellee's use of these terms conjured up in the mind of the jury a picture of a poor, defenseless corporate defendant at the mercy of a rapacious, unprincipled plaintiff. That a jury could ever be so moved is improbable. That the jury in the instant case became so inflamed is absurd, and even more important, not supported by the record.

Appellant next contends that appellee's argument imputed to appellant a rather derogatory opinion of the jury. An examination of this portion of the argument (without appellant's interpolations and insinuations) conclusively shows that this part was an admonition to the jury

to the effect that sympathy should not enter into their deliberation; that they should take a careful look at the evidence; that they should not discard their common sense and experience in deciding the case.

Finally, appellant argues that appellee's statements on the question of damages were prejudicial. In fact, it is appellant's present argument in this respect that is improper since she can point to nothing in the record which substantiates her claim in this regard. There is no indication that the additional damages of which appellant speaks were ever proved or even offered into evidence.

There is perhaps no more cogent evidence of the frivolity and insubstantiality of appellant's claim of impropriety and prejudice than the lack of objection to appellee's argument at trial. If appellee's argument had been as replete with impropriety and prejudice as appellant's brief now suggests, it is inconceivable that it would have escaped the objection of appellant's counsel or the condemnation of the trial court. The record shows neither. The truth of the matter is that appellee's argument was well within the limits of proper advocacy and was not objectionable then or now.

It perhaps should also be noted at this point that it is well-settled law that the power to set aside a verdict for misconduct of counsel should be sparingly exercised on appeal and should be utilized only in very extraordinary instances. *Twachtman v. Connelly,* 106 F.2d 508-09 (6th Cir. 1939); *Washington v. Georgetown R.R. v. Dashiell,* 7 App. D.C. 507, 515-16 (1895). This matter is left largely to the discretion of the trial court. When the exercise of such discretion has not been called for by opposing counsel and when the jury has been instructed that arguments of counsel are not to be regarded as evidence and that the case should be decided by the jury dispassionately, without sympathy or favor, the trial court's judgment should be left undisturbed. *Southern Ry. v. Harris,* 123 F.2d 7, 9 (5th Cir. 1941); *Twachtman v. Connelly, supra.*

In conclusion, appellee submits that appellant has failed to show any impropriety in appellee's argument or that said argument prejudiced her. The record is completely deficient in both respects.

IV. The Court's Charge to the Jury Was Correct and Did Not Constitute Reversible Error.

In her second claim of error, appellant, through a series of factual statements not supported by the record, contends that a damages instruction given by the court was erroneous and constituted reversible error.

It would seem, at the outset, since the jury found for appellee on the issue of liability, that a damages instruction, even an erroneous one, could not be considered prejudicial. Appellant claims, however, that the court's elimination from jury consideration, *on the damages issue*, of the wages paid to a maid during the period of appellant's employment "resulted in a finding of no liability, contrary to the evidence . . . ." It is clear that if the "erroneous" damages instruction resulted in a verdict "contrary to the evidence" it was incumbent upon appellant to file with this Court a record that was adequate to review this claim. Absent such a record, appellant's claim is groundless and should be dismissed.

Assuming the validity of appellant's own figures, there would have remained for jury consideration, after the court's instruction, the quite substantial sum of approximately $2,200 in special damages. Appellant's argument therefore falls of its own weight. The jury correctly decided this case on the issue of liability and the court's charge on the question of damages had no effect thereon.

Further, an examination of the court's charge demonstrates that the court was careful to treat the issue of liability and damages separately. The court clearly pointed out that the jury should consider the damages issue only if it had found for appellant on the liability issue. (J.A. 35) There was no possibility of confusion and appellant has certainly not shown the contrary.

Appellant's appraisal of the merit of this claim of error is evidenced by the fact that appellant has cited no case in support of her position. The single case cited by appellant dealt with a liability instruction and is clearly inapposite.

Appellant also relies on the collateral source doctrine and contends that the allegedly erroneous instruction is not consonant therewith. In support thereof appellant sets forth a general discussion of this doctrine as expounded by this Court and other courts. Appellant fails, however, to cite any case connecting the collateral source doctrine to the "facts" of the instant case. The collateral source doctrine obtains in situations where the benefits received by the plaintiff were derived from a collateral source by way of gift or preexisting contract or other right. See Restatement, *Torts* § 920, comment *e* (1939). It has no applicability to the instant "facts."

Appellee is at a loss to comprehend the significance of *Taylor v. Monongahela Ry.*, 155 F. Supp. 601 (W.D. Pa. 1957), *aff'd*, 256 F.2d 751 (3d Cir. 1958), and its companion, *Saganowich v. Hochikian*, 348 Pa. 313, 35 A.2d 343 (1944), cited by appellant at p. 22 of her brief. Both cases dealt with the question of damages due to loss of earning capacity and were in no way connected either with the collateral source doctrine or the issue in the instant case.[3]

Appellant's second claim of error suffers from the same deficiency as her first claim. The record in no way supports the allegation and claim made therein. It is subject to dismissal on that ground alone. Further, the legal authorities presented by appellant do not support her position.

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[3] Appellant is also mistaken in ascribing to the Third Circuit the quotation appearing at page 22 of her brief. Said quotation appears in the District Court opinion. See 155 F. Supp. at 603.

CONCLUSION

The assignments of error presented by appellant find no support in the record. Appellant has completely failed in her duty to supply this Court with an adequate record for review. Appellant waived her right to appeal on the basis of appellee's argument by failing to object thereto at trial. Further, the record does not support a claim that appellee's summation was improper. Nor does the record show any prejudice to appellant arising out of the court's charge to the jury. Insofar as they can be tested by the record available, appellee's summation and the trial court's charge were proper and correct. The judgment should be affirmed.

Respectfully submitted,

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